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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN OREGON COMPANY
DEFENDANT AND APPELLANT

VS.

UNITED STATES OF AMERICA
COMPLAINANT AND APPELLEE

Appellant's Brief of the Facts

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F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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FACTS ADMITTED BY COMPLAINANT.

I.

On March 3, 1869, Congress passed the act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, pleaded on pages 1, 2, 3 of Plaintiff's Complaint (pages 3, 4 and 5, printed Abstract of Record.)

II.

On June 18, 1874, Congress passed an act entitled, "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which act is pleaded on pages 3 and 4 of Plaintiff's Complaint (pages 5 and 6 of printed Abstract of Record).

III.

On October 22, 1870, the legislature of the State of Oregon passed "An act granting certain lands to the Coos Bay Wagon Road Company," which act is pleaded on pages 4 and 5 of the Plaintiff's Complaint (pages 6 and 7 of printed Abstract of Record).

IV.

It is admitted by the complainant that the road was completed and the grant earned.

V.

It is admitted that on the 31st day of May, 1875, the Coos Bay Wagon Road Company entered into the agreement (Exhibit B of the complaint) with John Miller to sell all the granted lands then unsold to John Miller, quoted on pages 42 to 55 of printed Abstract of Record.

VI.

It is admitted that on the 31st of May, 1875, the Coos Bay Wagon Road Company executed the deed to John Miller, pleaded on pages 55 to 72 of printed Abstract of Record.

VII.

It is admitted that on the 7th day of January, 1884, the Coos Bay Wagon Road Company executed to William H. Besse the deed pleaded on pages 78 to 101 of printed Abstract of Record.

VIII.

It is admitted that on the 8th day of March, 1884, the Oregon Southern Improvement Company executed to the Boston Safe Deposit & Trust Company the deed of trust pleaded on pages 101 to 126 of printed Abstract of Record.

IX.

It is admitted that the "Schedule containing all sales or conveyances made by the Coos Bay Wagon Road Company prior to May 31, 1875," printed on pages 36 to 41 of printed Abstract of Record, as Exhibit "A" is a correct list of all the lands sold by the Coos Bay Wagon Road Company prior to May 31, 1875, as to the description of the land, date of conveyance and name of purchaser.

X.

It is admitted that by *mesne* conveyances and through the proceedings in the United States Court for the District of Oregon in the foreclosure suit brought by the Boston Safe Deposit & Trust Company the legal title to all the lands described in Exhibit "H" to the bill of complaint, on pages 131 to 138 of printed Abstract of Record of said bill, became and at the date of the beginning of this suit was vested in the Southern Oregon Company.

FACTS PROVED BY THE TESTIMONY.

I.

A large portion of the lands included within the exterior limits of the grant had been taken up by settlers prior to the grant.

II.

The land remaining in the grant not taken by prior settlement consisted of two classes: First, the bottom land which was valuable for cultivation and, second, the hill and timber land not susceptible to settlement. About ten per cent of the grant was bottom land valuable for cultivation, and the remaining ninety per cent hill and timber land unfit for cultivation.

III.

The defendant is an innocent *bona fide* purchaser, for full value.

IV.

The hill and timber land, constituting about ninety per cent of the grant, could not be sold within five years from the date of the grant in 160-acre tracts for any sum.

V.

The government has heretofore litigated the question of the rights of the parties under this grant and is estopped by the record of the four suits. (Defendant's Exhibits 240, 241, 242 and 243, pages 410 to 528 of printed Abstract of Record.)

VI.

On January 1, 1884, the Oregon Southern Improvement Company executed in good faith, the trust deed to the Boston Safe Deposit and Trust Company, and the foreclosure of said mortgage, begun December 28, 1886, resulting in the sale June 23, 1887, by the master, to William J. Rotch and William W. Crapo, was necessary because the company at that time had become insolvent and was unable to meet the obligation.

W. W. Crapo—Pages 249 to 260 of Abstract of Record.

Wm. Rotch—Pages 260 to 279 of Abstract of Record.

This testimony is confirmed by all the letters passing between Smith, Crapo, Metcalf, Howard and every officer of the company, and the minutes of the resolutions introduced in evidence.

The above facts—admitted and proved—constitute the salient features of the case as presented. The greater part of the complainant's oral testimony attempted to show that the road was not properly constructed and was not, in fact, a good road. But this is entirely immaterial. The act of Congress having vested in the Governor the right to pass upon the fact as to whether the road was completed or not and the Governor having accepted the road, further inquiry is precluded. This same

point was presented in the case of the United States vs. Dalles Military Road Company, 40 Federal 114, and U. S. vs. Willamette Valley and Cascade Wagon Road, 54 Federal 807.

Outside of this testimony plaintiff's case, on the oral evidence, consisted of an attempt to show that during the years following the construction of the road the terms of the grant were talked about in the various small settlements lying along the road. But this fact, if it ever was a fact at all, is unimportant. It might be said, however, in passing that plaintiff's testimony does not sustain plaintiff's contention. It is true that some witnesses testified that Dr. Hamilton, president of the Coos Bay Wagon Road Company, told them they should have their lands at $2.50 per acre, but this was not because of any terms contained in the grant, nor does any witness testify that he was so informed by Hamilton. In none of the conversations reported by the witnesses were the terms of the grant referred to, nor was any intimation made by Hamilton that he was under *obligation* to sell at $2.50 per acre or any sum. Based upon the testimony of certain witnesses who say Hamilton promised them land at $2.50 an acre and the company wouldn't sell at that figure, the Government seeks to support the contention that the road company when applied to for lands refused to sell them, and much reliance is placed upon the cases of Johnson, Smith and Houghton. But these people were not claiming the *right to purchase* under the grant. They were *deny-*

ing the right of the road company to hold the land at all, and setting up an independent title in themselves. This is conclusively shown by the record of the suit brought by the company against Johnson (Defendant's Exhibit 199) and by the testimony of Yoakam, for defendant, and Batter, one of the complainant's witnesses. Yoakam testifies as follows (pages 281 to 283 of Abstract of Record):

"Q. Did you know a man named Johnson in there, about whom there was a dispute?

A. Yes.

Q. Do you know what he claimed about his land?

A. Well, he claimed he wasn't going to buy it.

Q. Wouldn't buy it?

A. Wouldn't buy it at any price.

Q. What did he claim about his being on there prior to the survey and therefore would not buy it?

A. He took up the land before it was surveyed.

Q. And state whether or not that was the reason he alleged he would not buy it of the company?

A. Yes, that is the reason he would not buy it; I tried to get him to buy it.

Q. Do you know a man named Richard Houghton in there that there was trouble with about the land?

A. Yes.

Q. What did he claim?

A. He claimed he was out of the three-mile limit.

Q. And that was the reason he would not buy it, that he was outside the limit of the three-mile grant?

A. Yes.

Q. Do you remember a man named Patrick Smith that you had trouble with about the land?

A. Yes.

Q. What did you have trouble about?

A. He would not buy it; he said it belonged to the government, and would not give any answer; he would not talk about it; he would not buy it at any price.

Q. Did Smith claim to be there ahead of the survey?

A. Yes; they were, we knew that.

Q. And these people were claiming to be in there ahead of the survey and would not buy at all?

A. Yes; I knew they were there ahead of the survey.

* * * * * * * *

Q. What were your instructions, Mr. Yoakam, at the time you were acting for the company in the adjustment with these settlers as to whether you should sell the lands or not?

A. *My instructions were to sell to every man that wanted to buy that had settled on the property, at any price I could get them to make, to use my judgment entirely, my own judgment and do the best I could with them to settle it with them, and sell the property to them if they would take it.*

* * * * * * * *

Q. Did you follow out those instructions?

A. I did.

Q. Did you endeavor to sell to them?

A. I did endeavor to sell to them, dozens and

dozens; I could not sell them, and there was a great many I did sell.

Q. During the time you were having these controversies with the people who had settled upon the land, prior to your coming, did you ever hear from any of them, or from anybody, a claim that there was a condition in this grant compelling the company to sell at $2.50 an acre and in 160-acre tracts?

A. Never heard such an idea advanced, although I offered to sell for less than that.

Q. But during that time did any of them make that claim?

A. Never.

Q. When did you first hear of that claim?

A. I never heard of that claim until some time within the last years, published in the papers throughout Coos Bay.

Q. A man by the name of Minot, at the time he brought this suit?

A. Yes; at the time he brought the individual suits, because I am well acquainted with Minot and the people he is interested in.

* * * * * * * *

Q. Now, Mr. Yoakam, after you get back a mile or a mile and a half from the sloughs or navigable waters where you could log advantageously, I will ask you if the balance of that grant running over the hillside and being timbered and rocky, could have been sold at that time for $2.50 an acre, and in 160-acre tracts, or for any sum in any quantities?

* * * * * * * *

A. No, it could not. You could take up any timber anywhere—take up Government land for nothing, where it was not surveyed at all."

The pleadings in the case of W. A. Johnson show that the claim now set up that the settlers were claiming that there was a limitation in the grant was not even mentioned. The following is a copy of Exhibit 199, omitting certificate:

"In the Circuit Court of the State of Oregon for the County of Coos. The Southern Oregon Company, plaintiff, vs. W. A. Johnson and Mary Johnson, defendants. Action at law to recover real property.

"The plaintiff above named for his cause of action against the defendants above named states and alleges the following facts:

"1st. That the plaintiff now is, and at all times in this complaint stated was, a private corporation duly organized and existing under the laws of the State of Oregon, and by its articles of incorporation duly authorized to receive title to, own and hold lands and other property.

"2d. That the plaintiff is the owner in fee of all those certain pieces and parcels of land situated, lying and being in the County of Coos and State of Oregon, particularly described as follows, to wit: Lots numbered seven and eight and the southwest quarter of the northwest quarter of section twenty-five in township twenty-eight, south of range twelve west of the Willamette Meridian.

"3d. That the plaintiff is entitled to the immediate possession of the said above-described lands, and that the defendants, W. A. Johnson and Mary Johnson, wrongfully withhold the possession of the same from plaintiff to the plaintiff's damage in the sum of two hundred dollars.

"Wherefore plaintiff demands judgment against the defendants for the recovery of the possession of the demanded premises, and for the sum of two hundred dollars damages for the withholding the possession thereof, and the costs and disbursements of this action. S. H. HAZARD,

Attorney for Plaintiff.

"In the Circuit Court, Coos County, State of Oregon. The Southern Oregon Company, plaintiff, vs. W. A. Johnson and Mary Johnson, defendants.

"The defendants for answer to the plaintiff's complaint herein,

"1. Deny that plaintiff is the owner in fee of land situated, lying and being in the County of Coos and State of Oregon, particularly described as follows: Lots numbered 7 and 8 and southwest ¼ of northwest ¼ of section 25 in township 28, south of range 12 west of the Willamette Meridian, or any of said lands, or have any title in fee or other title or any title to said lands.

"2. Deny that plaintiff is entitled to the immediate possession of said above described lands, or any of said lands, or any possession of any of said lands immediately or at any time.

"3. Deny that the defendants or either of them,

wrongfully or otherwise, withhold the possession of said described lands, or any of said lands, to the plaintiff's damage in the sum of $200 or in any sum or any damage, or at all.

"II.

"For a second and further defense defendants allege:

"1. That during all the time the plaintiff and their grantors have claimed the premises described in the complaint herein, these defendants were in the actual possession of said lands, claiming and holding the same adverse to the plaintiff and their grantors.

"2. That in the year 1873 one G. D. Hobson was in the actual possession of and living upon said described lands and holding the same adversely to the plaintiffs, their grantors and all other persons, and so held the same until the year 1875.

"3. That in the year 1875 one John Clinton for a valuable consideration purchased all of said Hobson's right, claim, interest and possession of said described lands, and immediately thereafter took and continued actual possession of and lived upon the same and continued to hold the same adversely to the plaintiffs and their grantors and adversely to their pretended title until the year 1878.

"4. That in the year 1878 these defendants for a valuable consideration purchased of the said John Clinton all of his claim, right and possession to and of said described lands, and defendants took immediate, actual and continued possession of and have

ever since and still lived upon said lands and held and still hold the same adversely to the plaintiffs and their grantors and their pretended title thereto.

"5. For 18 years the defendants, their predecessors and grantors have been in the actual and continued possession of said lands and lived upon and held the same adversely to the pretended title of the plaintiff and their grantors and to the plaintiffs and their grantors.

"III.

"For third defense, defendants say:

"1. That these defendants have been and now are holding said premises described adversely, to the plaintiff in good faith, and that while so holding they made permanent improvements upon the premises of the present value of $2500. That they are still existing and affixed to the land, and that they better the conditions of the property for the ordinary purposes for which it is used, which sum or so much thereof as may be necessary the defendants will set off against the damages to which the plaintiff may be entitled for the use and occupation of said premises in case of recovery thereof by plaintiffs.

"Wherefore defendants ask that plaintiff do not recover against defendants and that defendants may recover costs, etc.

T. G. Owen,
E. D. Sperry,
Defendants' Attorneys."

This Exhibit 199 is not in the printed Abstract, but the original is here under order of Court.

In view of this testimony it is clear that even though Hamilton, as president of Coos Bay Wagon Road Company, told different people that the company would sell to them at $2.50 per acre, and although this matter was discussed by the settlers, no one interested in acquiring title to the lands or any of them ever set up the claim that the company was obliged to sell the lands at any price or in any quantity. A reference to the testimony will further show that the witnesses got this grant mixed up with the railroad grant and thought there was something in it about "settlers" or "actual settlers."

For instance, a man named Loggie, who for a time was in the employ of Oregon Southern Improvement Company, says (pages 384-385 of printed Abstract):

"Q. You have a distinct recollection, have you, of discussing the terms of the grant?

A. Oh, yes, I remember talking it over with Hazard, yes.

Q. And you say you discussed with him the terms of that grant with reference to these lands being sold to settlers or actual settlers?

A. Yes, I remember those two distinct terms. I think they were applicable to—one to the Coos Bay Wagon Road and one to some other grant; one was settlers and the other actual settlers. I remember of those two, of the difference in those two terms.

Q. You are positive that the condition of the grant to the Coos Bay Wagon Road Company was that the land should be sold to settlers or to actual settlers, whichever one of those terms may apply?

A. Well, I don't remember of reading it, but that was the general opinion.

Q. And that is the opinion you are testifying to here as being entertained by everybody down there?

A. It was generally conceded that that was the—

Q. Generally conceded by everybody that that was the terms of the grant?

A. Yes, sir." * * *

Other witnesses testify to the same thing, showing clearly that they had in mind the railroad grant and not the wagon road grant. But no witness claims that either the Oregon Southern Improvement Company or this defendant or its officers ever heard of such a claim.

All plaintiff's testimony as to the character of the constructed road, as to local rumors of the pretended conditions in the grant, as to Dr. Hamilton's promises, as to the cost of clearing the land should be struck out as immaterial. But if it is left in it doesn't change or affect the issues.

CULTIVABLE LANDS TAKEN UP PRIOR TO GRANT.

Under the first heading *supra,* that a large portion of the lands within the limits of the grant had been taken prior to the grant, we cite the court to the following testimony showing that the land in the valleys had practically all been taken up prior to the grant:

W. J. Coates—Page 245, Abstract of Record.

A. E. Bushnell—Page 246, Abstract of Record.

RELATIVE PERCENTAGE OF BOTTOM LAND FIT FOR CULTIVATION AND HILL LAND NOT SUITABLE FOR SETTLEMENT.

As to the second heading *supra,* that only a small portion of the grant was cultivatable—being bottom land—we cite the court to the following testimony in the printed Abstract of Record.

Percentage of Bottom

Land which was valuable for cultivation and hill and timber land not susceptible to settlement:

S. A. Gurney, page 243. Estimates bottom land 1/10.

W. J. Coates, pages 244-245. Estimates bottom land 1/10.

A. E. Bushnell, page 246. Estimates 1 acre on 160.

Geo. S. Gothro, page 319. Estimates 1 to 3 per cent.

D. J. Thrift, County Assessor, page 229. Estimates 3000 acres on whole grant, half a township, barren and of no value at any time.

W. Z. Cotton, page 225. Not over 20 per cent.

George Norris, page 234. Estimates 25 per cent.

L. E. Rose, page 240. Estimates it as very little—amount of bottom land very small.

J. J. Klinkenbeard, page 242. Ten per cent would certainly cover it.

L. D. Smith, page 228. So small could not make guess.

INNOCENT PURCHASER.

That the defendant, Southern Oregon Company, was an innocent purchaser in good faith is conclusively shown by the testimony, if such fact ever can be shown. It must be remembered that over forty years have elapsed since the completion of this road. All the parties identified with its construction, whether officers of the Coos Bay Wagon Road Company or of the Oregon Southern Company, are dead: Besse, who made the original purchase; Metcalf, the first manager of the company; Hamilton, president of the Coos Bay Wagon Road Company; Prosper and Elijah Smith, who were active in furnishing money and assisting in carrying on the company, and Elijah Smith particularly, being president for many years. These people have all passed away and left the defense of their acts in the hands of others who had no connection with the initiation of the work. Crapo, however, who helped finance the

project after the lands had passed out of the Coos Bay Wagon Road Company, is still alive and his testimony is in the record in the shape of a deposition. Mr. Crapo was a man of affairs in the early days. As he says himself: "I have served in Congress, have been president of railroads and of banking institutions, state and nation, and have administered trust estates." On pages 249 to 260 of Abstract of Record, he gives a history of his connection with the project of buying the Coos Bay Wagon Road Company land through Besse, how the money was raised, etc., and the good faith of the purchaser, as follows:

Whereupon the defendant and appellant called W. W. Crapo, who testified in substance as follows:

"That he is eighty-one years old, lives in New Bedford, Mass.; is by profession a lawyer; has served in Congress, been president of banking institutions, state and national, has administered trustee estates and has been active in business affairs during his whole life. He first became interested in Southern Oregon Company lands in 1883; that Wm. H. Besse induced him to invest some money in the purchase of bonds of the Oregon Southern Improvement Company, which covered the properties in dispute in this suit. That about March, 1883, Wm. H. Besse was the owner of a number of ships and had been out on the Oregon coast investigating the land in the neighborhood of Empire City and Coos Bay and was very much interested in it and very

enthusiastic about it. In about June or July of that year he urged him (Crapo) to join him in investments at that point, and Besse stated that in his judgment Empire City was the only port that was available for commercial purposes between San Francisco and Portland; that the bay was a fine body of water; the entries to the bay easy; it had a custom house and was the county seat of Coos County, and it offered to his mind great prospects of being a very important point on the Pacific Coast. He had become acquainted with a man named Luce, who was the principal owner of Empire City, owning a mill there, timber land, hotel and stores. Besse bought this property, but whether he had already bought it or bought it subsequent to that time, the witness does not remember. It became, however, a part of the investment in the Coos Bay Company. There was about 6,000 acres of it—a small mill and extensive dock and wharf property, where vessels stopped, etc. Another thing which attracted Captain Besse's mind and which he communicated to Mr. Crapo, was that there were coal mines in operation in the vicinity, and he had an idea of transportation of coal and lumber to San Francisco. Besse gave Crapo the names of persons who had already subscribed to the Empire, and they were men of large means in New Bedford. The proposition made by Besse was for the purchase of bonds of the property acquired, or to be acquired, of the Oregon Southern Improvement Company. The witness purchased the bonds; at first purchas-

ing $10,000 worth; afterwards he made other purchases. The bonds were sold for actual cash at the price of 80 cents on the dollar, although some sold as low as 50 cents on the dollar. In the inception of the enterprise there was no talk then about the Coos Bay Wagon Road Company. That came in later on in the negotiations. Touching this matter, witness testifies that Besse told him he had the opportunity to purchase about 100,000 acres of land, which had been acquired by the company, or by some parties, and which grew out of a land grant given by Congress to the State of Oregon, for the building of a military wagon road from Roseburg to Coos Bay. Witness says that he was over the road twice, some years afterwards. Besse thought this land would be a very valuable addition to the property already acquired, and talked about buying coal mines in anticipation of the great development of Empire City and the timber resources and productions which would come down to Coos Bay. His attention had been called to the Coos Bay Wagon Road lands, that they could be purchased, and he asked the witness's judgment about it. The witness told Besse that two things were essential before he closed any negotiations: One was the matter of title, the other was the value of the property. Witness told Besse that the title should be carefully examined so as to know what the condition of it was. Besse afterwards reported to witness that the title had been examined by a lawyer in Portland, who had declared it perfect. Witness says that at the time he had in

his employ a man familiar with timber and the method of cruising, who was a logger, woodsman and timber cruiser, and Besse wanted witness to send Foster to Oregon to cruise the timber, and witness did so. Foster did cruise the timber and reported on it. Witness says he never had any communication with or relations with the Coos Bay Wagon Road Company, or with John Miller, or Collis P. Huntington, or Charles Crocker, the parties mentioned in the complaint in this suit. Witness knew Russel Gray as a lawyer in Boston, but had no acquaintance or relations with him as to the matters involved in this suit. Witness testified that he had nothing further to do with the transfer of title in 1883 or 1884, or the execution of the mortgage, or the acquisition of these properties, except as herein outlined. Witness remembers that the Oregon Southern Improvement Company in 1884 executed to the Boston Safe Deposit & Trust Company a mortgage on the properties, and it was the bonds under that mortgage which witness bought. The Oregon Southern Improvement Company was not successful. It spent a large amount of money in building a new mill and building a steamer, which proved unsuitable, and there were heavy losses on the mill and steamer. Due to this and large expense for building a logging railroad, which proved unprofitable, and the market for lumber having fallen away, the company was unable to pay the interest on its bonds. Witness says that about $800,000 was actually spent in money for these dif-

ferent properties, including the Coos Bay Wagon Road Company's lands. The company paid $100,000 for the 'Coos Bay Wagon Road lands,' being the lands title to which is involved in this suit. On the 9th of December, 1886, the Boston Safe Deposit & Trust Company, which was the trustee under the bond mortgage, was succeeded by Wm. J. Rotch and Edw. D. Mandell, as trustees. The reason for that was that the Oregon Southern Improvement Company was in considerable financial distress and it became to the interest of the bondholders to have a foreclosure of the mortgage that the property might be placed in condition for operation, etc. The change was a matter merely of convenience and because the Boston Safe Deposit & Trust Company did not wish to begin the foreclosure proceedings.

The witness further testified as follows:

Q. Mr. Crapo, at that time did you know of a limitation in the original Act of Congress?

A. I did not.

Q. Did the retirement of the Boston Safe Deposit Company as trustee and the substitution of Mr. Rotch and Mr. Mandell have anything to do with the limitation?

A. Nothing whatever; no suggestion at that time had ever been made to my knowledge, that there was any defect in the title of the Coos Bay land.

Q. Well, they proceeded to foreclose?

A. Yes.

Q. And then you and Mr. Rotch purchased the property?

A. Yes.

Q. At the foreclosure sale, for the benefit of the bondholders?

A. Yes.

Q. How did it happen you and Mr. Rotch purchased at the sale instead of you and Mr. Mandell? Had Mandell died?

A. No.

Q. When did he die?

A. He died subsequently to that; I think Mr. Rotch died before Mr. Mandell died. They were the trustees and naturally the committee of bondholders for the purchase would be different parties.

Q. So it was specially by arrangement among the bondholders that you and Mr. Rotch were appointed?

A. Yes.

Q. And you received the conveyance?

A. From the court.

Q. At that time, Mr. Crapo, had you any knowledge whatever of the limitation in the original Act of Congress?

A. None whatever.

Q. Did Mr. Rotch?

A. I am sure he did not.

Q. You were constantly with him?

A. Oh, yes.

Q. What were your relations with Mr. Rotch?

A. In business and socially, very intimate.

Q. You knew of these matters?

A. Yes.

Q. And Mr. Rotch is dead?

A. Yes.

Q. When did he die?

A. In 1893.

Q. Then the Southern Oregon Company was organized out of the bondholders?

A. The Southern Oregon Company was organized to take this property.

Q. And you made conveyance?

A. Yes; made conveyance to the Southern Oregon Company.

Q. And at the time you made that conveyance, which was on the 14th day of December, 1887, had you any knowledge up to that time of this limitation?

A. None whatever.

Q. Or any defect in the title?

A. No.

Q. Had Mr. Rotch, as far as you know.

A. No.

Q. Did the persons who composed the bondholders of the Southern Oregon Company have any?

A. No, I think not; I don't think it is possible that they could have known.

Q. Do you remember what the arrangement was in the organization of the Southern Oregon Company as to what the bondholders were to receive in the stock of the Southern Oregon Company?

A. Well, the Southern Oregon Company was organized with its capital stock fixed at $1,500,000; the bondholders received ten shares of stock for each

$1,000 bond in the Southern Oregon Company upon the payment of an assessment of $50 or $100, I don't recall which; but there was an assessment made which furnished some ready cash.

Q. To pay the expenses of foreclosure, I suppose. Anything else?

A. Yes; the money passed through the hands, and all the accounting, etc., of Prosper W. Smith, who was the treasurer; but that was the fact. When that distribution was made there was left in his hands—it didn't take the whole million and a half; it took about one million two hundred and odd thousands, so there was some—

Q. $250,000?

A. $260,000 or $270,000 that was left, what we called treasury stock; the whole million and a half was not issued; the only issue was enough to satisfy the bondholders and the balance was not issued except it was issued at the time in the name of William J. Rotch and William W. Crapo, trustees.

Q. What did you do with it?

A. Afterwards we transferred that to the Southern Oregon Company.

Q. You gave the treasury stock?

A. We gave the treasury stock.

Q. Now when was the first time that you ever heard of the limitation in the original Act of Congress which was not incorporated in the patents?

A. It was about the time of the Nichols suit.

Q. What was that suit?

A. A man named Nichols had tendered to the

Southern Oregon Company $400 and demanded a deed of a certain specified 160 acres of land.

Q. Can you tell about what time that was?

A. I should say it was seven or eight years ago.

Q. 1903 or 1904?

A. Yes.

Q. Up to that time you had never heard of this limitation?

A. That was the first intimation I had of it when that suit was brought.

Q. When was that suit?

A. The record will give that, to the best of my impression.

Q. That suit you say this Nichols brought—

A. Nichols was the plaintiff.

Q. He had made a tender?

A. He had tendered $400, which was $2.50 an acre, for 160 acres of land specified, and the land he wanted was, of course, a choice section, and there was a multitude of other people who also made their tenders.

Q. What became of them?

A. One was Senator Tillman, of South Carolina, by the way, but the only suit brought was by this man Nichols.

Q. What became of it?

A. It was tried and it was the decision of the judge — Bellinger, I believe — a circuit judge; he dismissed the petition; it was in favor of the defendant, the Southern Oregon corporation.

Q. It was through that this first came to your observation, through that agitation?

A. Yes.

Q. Mr. Rotch died when?

A. In 1893.

Q. So he could not have heard anything of it?

A. No.

Q. At the time of his death?

A. No.

Q. Now, Mr. Crapo, I want to put one or two direct questions on account of the allegations of that bill brought by the Government of the United States. Was the alleged indebtedness which was the basis of the mortgage fictitious, feigned and untrue?

A. That is not true; it was not fictitious.

Q. 'Feigned and untrue,' the United States alleges that. What do you say to that?

A. I say it is not correct.

Q. What was it?

A. It was the expenditure of a large amount of money.

Q. Actual value?

A. Actual value; I know my investment of money was actual.

Q. Was it made for the purpose, made and foreclosed with the intent and hope that thereby the limitation of the Act of Congress might be avoided and defeated?

A. It is not so.

Q. Did it have anything to do with it whatever?

A. None; the purpose was to save to the bondholders all we could get from the property.

Q. Was there any justification, so far as you know, for any such allegation in the bill brought by the United States of America?

A. None whatever.

Q. These bonds were held how generally? That is, what citizens of what states owned them?

A. Why, the largest holdings were here, I suppose, in New Bedford; there were some in Wareham and on the Cape, some in Boston, quite a number in Maine, some in New York. I speak of that, knowing that the bonds came through my channel in distributing the stock.

Q. The stock that was distributed for the bonds you had to sign the certificates?

A. Yes, or under my direction.

Q. So far as you know, they were substantial?

A. All *bona fide*.

Q. And you have stated all the knowledge or participation which you had in the original purchase by Captain Besse from the Crocker-Huntington syndicate?

A. I have.

Q. Have you at any time done any act or made any admission that this title was subject to the limitation of the Act of Congress?

A. No, I have not.

Q. Or have you ever done any act or made any attempt to conceal from the United States the alleged violation of the limitation?

A. None whatever.

Q. Was any act that you have ever done in connection with this company, the Southern Oregon Improvement Company, ever done with the purpose of concealing any such limitation from the United States?

A. Never; no, none whatever.

Q. Are you now interested in the Southern Oregon Company?

A. I have no financial interest in the company, either as stockholder or as creditor, absolutely no pecuniary interest in the Southern Oregon Company or in this company.

Q. I ask you now whether you had any interest whatever in the stock of the Oregon Southern Company, or ever had any interest in the stock of the Oregon Southern Improvement Company?

A. No.

Q. None whatever?

A. None.

The witness further testified that before the Southern Oregon Improvement Company invested in the lands he caused an experienced timber cruiser, by the name of Foster, to visit the lands, examine them and make a report to him and his associates. He further said that only a sufficient amount of stock was issued by the Southern Oregon Company to satisfy the bondholders of the Oregon Southern Improvement Company."

William Rotch was treasurer and assistant sec-

retary of the company from 1883 to 1884. His deposition was taken and he explains fully the organization of the Oregon Southern Improvement Company, the issuing of bonds, the mortgage to the Boston Safe Deposit Company and the general dealings, beginning with the purchase by Besse and ending with the foreclosure proceedings in the United States Court. His testimony is that of a man of capacity and shows that he fully understood and remembered the various transactions connected with this property in the early days. We quote his testimony as found on pages 260 to 275 of printed Abstract:

"That he is by profession a civil engineer, having obtained his degree in Paris in 1869; that from that time up to about ten years ago he was actively engaged as an engineer in railroad construction and other engineering work; that he still acts as consulting engineer, but is not in the active practice. That he was first connected with the Oregon Southern Improvement Company in 1883. That the Oregon Southern Improvement Company was organized at first by Captain Wm. H. Besse, who was a retired ship master in New Bedford, and who had commanded a number of ships, and the father of witness—Wm. J. Rotch—was interested. Witness's father, Wm. J. Rotch, was one of the largest subscribers to the securities of the Oregon Southern Improvement Company, and his partner, L. A. Plummer, subscribed an equal amount. Witness testified that he became an officer in the Oregon Southern

Improvement Company, to wit, treasurer and assistant secretary, from April, 1883, to August, 1884. The office of the company was in the witness's office in Boston. Witness kept the books, or accounts, of the company as treasurer. The last time he saw them was in 1884, when he turned them over to his successor, Prosper W. Smith, and he has not seen them since that. During the year 1883 the witness received subscriptions from various people who were to take bonds of the Oregon Southern Improvement Company. Witness received during 1883 cash subscriptions to the amount of $177,000. The mortgage was executed by the Oregon Southern Improvement Company to the Boston Safe Deposit & Trust Company—two mortgages—to secure the bonds of the company. The mortgage was dated January 1, 1884, and was executed about April, 1884. There was a delay from the time of the execution of the bonds up to the time of their delivery, on account of having a supplemental mortgage issued, because the land lay in two counties. Witness was treasurer when the bonds were ready for distribution. The bonds were delivered to the persons who paid in the money on the subscriptions. The bonds were issued at 80 and carried an amount of stock in the company equal to the amount of the bonds. The company spent $100,000 for a steamer called the 'Alki.' The company purchased lands of the Coos Bay Wagon Road Company while the witness was treasurer. The money did not pass directly through the witness's hands. The original subscriptions were not

sufficient to pay all the expenses of the company and to purchase this additional amount of land, and after preceding purchases of land had been paid for. A syndicate of six persons, who were all original subscribers, arranged to furnish the money for the purchase of the Coos Bay Wagon Road land and to receive bonds and stock on the same basis of the original subscription. Witness delivered the bonds and stock of the company to the syndicate in return for the land. This includes all of the land except the 30,000 acres sold to Miller and afterward to Huntington, Hopkins and Crocker. That was paid in cash, and amounted to $30,000. This left the land known as the Coos Bay Company's land 60,000 acres, which was paid for at $1.50 an acre, making $90,000—in all for the Coos Bay Company's land $120,000. No bonds were ever issued except to subscribers and on the basis of 80 per cent of the par value.

Concerning the business of the Oregon Southern Improvement Company and its failure, this witness says:

Q. 70. Will you tell us a little, Mr. Rotch, about the business of the company while you were treasurer—what business it was engaged in?

A. Captain Besse, in his command of ships from New Bedford, had occasion to visit the Pacific Coast on many occasions, and he noticed that the harbor at Coos Bay, in the southern part of Oregon, appeared to be a very attractive harbor, and he had discovered that the timber on the land in that vicin-

ity, in the vicinity of Empire City, which is located on Coos Bay, and farther to the north, was very well wooded, and that the timber was apparently very valuable. He organized this company with the special purpose of buying that land, or some of it, building a mill, a large sawmill, constructing a railroad and operating it, taking the timber in a steamer and also in schooners to be chartered, to San Francisco and other points for sale. There was also coal on some of the Luce land—we called it the Luce land—bought from a man named Luce.

Q. 71. Where was that located?

A. In the vicinity of Empire City, on the shore of Coos Bay. Those coal deposits were considered quite valuable on that land.

Q. 72. Did the company have an agent in Empire City?

A. Yes.

Q. 73. And was he at work developing the resources of the company there?

A. Yes; J. N. Knowles was the first agent.

Q. 74. Did you send him money from time to time in order to pay the expenses of the work done in Oregon?

A. I did, yes; I sent him $75,000 at one time and smaller amounts at other times.

Q. 75. Going back to the mortgage for a moment, Mr. Rotch, do you remember the amount of bonds authorized?

A. Two millions.

Q. 76. And those were what, six per cent bonds?

A. They were six per cent bonds.

Q. 77. When were the first coupons due?

A. The first coupon was due six months after the date of the bonds. That would be July 1, 1884.

Q. 78. When July 1 came did you have money enough to pay the interest on those bonds?

A. No, we didn't.

Q. 79. What did you do?

A. The company didn't wish to have a default if it was possible to avoid it, and many of the larger subscribers were asked to take bonds for their coupons. They did this. But to the best of my recollection a number of the bondholders had their coupons paid in cash.

Q. 80. Were all the coupons then paid either in cash or else by the owners taking bonds?

A. They were, to the best of my recollection.

Q. 81. Were you an owner of bonds yourself, Mr. Rotch?

A. Yes; I subscribed to $5,000 myself and paid for them $4,000, with 50 shares of stock, I should say.

Q. 82. Now, interest was next payable on January 1, 1885?

A. Yes.

Q. 83. Was that interest paid?

A. No, it was not.

Q. 84. And was interest ever paid after July 1, 1884?

A. No, to the best of my recollection nothing

was paid. I know I got no payment on my coupons and I don't think anybody did.

Q. 85. After you ceased to hold the office of treasurer and assistant secretary, which I understand was in August, 1884?

A. Yes.

Q. 86. What connection did you have with the affairs of the company?

A. I had no official connection. My connection was a bondholder and stockholder and representing the large interest which my father had, which was one of the largest, if not the largest interest.

Q. 87. Could you state roughly about what his investment amounted to?

A. It was about $100,000 finally.

Q. 88. Who succeeded you as treasurer?

A. Prosper W. Smith.

Q. 89. And who succeeded Captain Besse as president?

A. Elijah Smith; they were brothers.

Q. 90. Who were they?

A. They were brothers who had got their early business education in New Bedford, and they afterwards moved to Boston, where Prosper Smith remained until his death, but Elijah Smith went to New York and other places and to the Pacific Coast, and he lived in a great many places all over the country.

Q. 91. Were you well acquainted with those two gentlemen?

A. Yes, very well acquainted. I had been ac-

quainted with them in early life and all my life I knew them well.

Q. 92. After you ceased to be treasurer, was it your custom to consult them as to the affairs of the company?

A. Yes.

Q. 93. Did you keep track of the affairs of the company in a general way?

A. I went into the office of the company very frequently, both in my own interest and as representing my father. I kept in pretty constant touch with the affairs of the company.

Q. 94. Were you also acquainted with Mr. W. W. Crapo?

A. I was very well acquainted with him—of the firm of Crapo, Clifford & Prescott of New Bedford.

Q. 95. It has appeared, has it not, Mr. Rotch, that your father lived in New Bedford?

A. Yes.

Q. 96. And you were born there?

A. I was born there.

Q. 97. And lived there until you came to Boston in 1880?

A. No; after I graduated at Harvard College I went abroad, in 1865, and graduated from the Ecole Centrale in 1869. Then I came back and remained in New Bedford only about a year and a half, and I went to Fall River and built the Fall River water works, and remained there until 1880. Since 1880 I have been in Boston.

Q. 98. Your earliest associations were with New Bedford?

A. Yes.

Q. 99. And with New Bedford people?

A. Oh, yes; William W. Crapo lived for a number of years in one of my father's houses, which he rented.

Q. 100. Can you name some of the other large investors with whom you were acquainted?

A. Leander A. Plummer, Alexander H. Seabury, George S. Homer.

Q. 101. Were they of New Bedford?

A. All of New Bedford.

Q. 102. Were these gentlemen all then of standing in the community?

A. They were, yes; they were of high standing, all of them, in New Bedford. Most of them had made their money in shipping, the whale fishery, and their fathers before them had left them money from this same source.

Q. 103. Now, do you remember, Mr. Rotch, that this mortgage was foreclosed?

A. I do.

Q. 104. And about when, do you recall?

A. Well, it was about 1887. The proceedings may have begun in 1886, but I think the foreclosure was in 1887.

Q. 105. Do you recall that the trustee, the Boston Safe Deposit & Trust Company, resigned?

A. Yes.

Q. 106. And that William J. Rotch and Edward D. Mandell became trustees in its stead?

A. Yes; Edward D. Mandell was one of the trustees of Hettie Green's property.

Q. 107. Now, you say that you kept pretty close track of the affairs of the corporation on account of your own interest and on account of your father's interest?

A. I did.

Q. 108. Can you tell us why that foreclosure took place, Mr. Rotch?

A. Because the company was unable to pay its obligations.

Q. 109. Was there any other reason that you know of?

A. It was unable to pay its obligations and could obtain no more money to carry on this property.

Q. 110. Were you familiar with the foreclosure proceedings; the course of the foreclosure proceedings?

A. I was, to a great extent.

Q. 111. And do you remember who purchased the property at the foreclosure sale?

A. The property was purchased by, I think, my father and William W. Crapo.

Q. 112. And did they purchase in their own right or for somebody else?

A. No; they were acting for the bondholders in general.

Q. 113. And after they purchased the property was it transferred to a new company?

A. It was.

Q. 114. And what company was that?

A. The Southern Oregon Company.

Q. 115. And that is the defendant in this action, as you understand it?

A. Yes.

Q. 116. Do you remember what stock in the new company was issued to the bondholders, what amount of stock?

A. Yes.

Q. 117. Will you tell us, please?

A. The stockholders in the new Southern Oregon Company, which purchased the property, received a little more stock than was represented by the par value of the bonds. I know I had $5,000 of the bonds. For the reorganization expenses I paid $500 and other bondholders paid at the same ratio. That is, $100 for each thousand-dollar bond. I received 51 and a fraction shares of stock in the Southern Oregon Company and other bondholders received practically the same proportionate amount.

Q. 118. Were there any bonds of that latter company?

A. No.

Q. 119. And that, you say, was about 1887?

A. 1887.

Q. 120. Now, Mr. Rotch, returning to the land which came from the Coos Bay Wagon Road Company, including the Crocker purchase, which was

originally a part of the same tract, both those tracts were purchased while you were treasurer?

A. Yes.

Q. 121. Did the company have a report made to it on the title?

A. Yes.

Q. 122. Do you remember who made the report?

A. I can't remember who made it; there was an abstract of title which was very elaborate; I can't remember now who made it.

Q. 123. Some one in Oregon, probably?

A. Yes; our affairs in Oregon—

Q. 124. Well, never mind, Mr. Rotch. I am afraid we will go astray. If you can remember, tell us; if you can't remember, never mind.

A. Well, it was somebody that was recommended by Jonathan Bourne, Jr., who was afterwards senator from Oregon. He was acting as our agent.

Q. 125. You don't recall who it was?

A. No, I don't remember.

Q. 126. Was it reported to you that the company had a good title to this land?

Mr. Smith: I object to that as calling for hearsay testimony, not the best evidence, and ask that this objection be made in addition to the other objection which I have made.

A. Yes.

Q. 127. Did you know, Mr. Rotch, of any defect in the title?

A. I did not; I had no idea of it.

Q. 128. Did you know that this land came originally from the United States?

A. Yes.

Q. 129. Let me call your attention to the Act of Congress of March 3, 1869, which act provided for a grant of lands to the State of Oregon to aid in the construction of a road built subsequently by the Coos Bay Wagon Road Company, and especially to this provision in the act:

'Provided, further, that the grant of lands hereby made shall be upon the condition that the land shall be sold to any one person only in quantities not greater than one quarter-section and for a price not exceeding $2.50 per acre.'

At the time of the purchase of those lands did you have any knowledge of that provision in the Act of Congress?

A. No; I never heard anything about it until—

Q. 130. Let us take one step at a time. At the time of the purchase, did you have any such knowledge?

A. No, I had no idea of it; it was never mentioned.

Q. 131. At the time the mortgage was made and executed did you have any such knowledge?

A. No.

Q. 132. Were you one of the officers of the company who executed the mortgage on its behalf?

A. Yes.

Q. 133. Did you have any knowledge of that

provision in the act at the time of the foreclosure proceedings?

A. No.

Q. 134. When did you first obtain any knowledge as to that provision?

A. It was perhaps six or seven years ago; I can't remember exactly.

Q. 135. And how did that happen, Mr. Rotch? Do you remember?

A. The company, Southern Oregon Company, was trying to sell its land. It obtained what was considered a good offer, and $60,000 was paid by the prospective purchaser to bind the bargain. It was reported to the company later that this prospective purchaser had discovered some flaw in the title and he refused to pay any more. The $60,000 was forfeited to the company and retained by the company. Then I had many interviews with Prosper Smith and Elijah Smith, who then explained to me that it was claimed that people had a right to take a quarter-section and pay $2.50 an acre. That was the first time I ever heard anything about it.

Q. 136. And that, you say, was six or seven years ago?

A. I can't remember exactly; I think it must have been.

Q. 137. It was, at any rate, long after the foreclosure?

A. Yes; I know it was not ten years ago, but I can't remember the exact date now.

Q. 138. Did you ever hear anything stated from

your associates in the company or from the bondholders or stockholders which would lead you to believe that they had any knowledge of such a provision?

Mr. Smith: I object to this especially as calling for a mere conclusion of the witness and not a statement of fact.

(The pending question, No. 138, is read.)

A. No, I never did.

Q. 139. When the mortgage to the Boston Safe Deposit & Trust Company was given, Mr. Rotch, was there any intention on the part of the company or its officers to suffer a foreclosure later in order to get rid of this proviso in the act to which I have referred?

Mr. Smith: I object to this especially for the reason that it calls for a mere conclusion.

A. No; there was nothing of the kind.

Q. 140. Did you ever hear any such suggestion made by any of the officers or persons interested in the company?

A. Never.

Q. 141. Did you hear of any such plan at a later period when the foreclosure proceedings were actually started?

A. No.

Q. 142. Have you any financial interest in the Southern Oregon Company, Mr. Rotch, at the present time?

A. None.

Q. 143. When did you part with your interest?

A. In 1910 I sold my stock and the stock belonging to the estate of my father and the stock belonging to all of my sisters, who had received some from my father's estate, to Elijah Smith. The money was paid by Kidder, Peabody & Co.

Q. 144. You were executor of your father's estate at that time?

A. Yes.

Q. 145. And acted as executor and agent for your sisters?

A. Yes.

Q. 146. So you have no stock and none of your family have stock, so far as you know?

A. None of the family has any stock today.

Q. 147. There is one more matter, Mr. Rotch, to which I wish to call your attention. Do you remember that at a meeting of the directors while you were treasurer a vote was passed authorizing the issuing of 2,000 shares of stock to Captain William H. Besse for his services?

A. Yes, I kept the minutes of the meeting and I remember that that vote was passed, but there was—

Q. 148. Was there any condition attached to that vote?

A. There was a condition.

Q. 149. Will you state what that condition was?

A. It was voted to issue 2,000 shares of stock to Captain Besse for his services in organizing the company and obtaining this land, which was supposed to be very valuable. The 2,000 were voted to him provided the issue of these 2,000 shares should be

approved and ratified by a committee of three men.

Q. 150. And who were the three, do you remember?

A. William W. Crapo was one; I can't remember just who all three were. I think my father was one. William W. Crapo. I can't remember the other one.

Q. 151. Your father and William W. Crapo were two of the three?

A. Yes, but I can't remember the other one.

Q. 152. Did they approve of the issue?

A. They did not.

Q. 153. And was that stock ever issued to Captain Besse?

A. It was never issued."

Robert E. Shine was in the employ of the company from 1888 to 1911 as bookkeeper, secretary and local manager. On the question of notice of the conditions in the granting act he says (pages 296 to 297, printed Abstract):

"Q. I will ask you to state whether during your time there in the employ of the company you heard of any defect in the title of the Southern Oregon Company, by reason of a clause in the grant to the company regarding the sale of its lands?

A. Not until about the time the Nichols suit was brought and what we call the Seabrook and McKnight gamble was started.

Q. That was about 1905, was it?

A. I think so.

Q. It was about the time of the Nichols suit, anyway. The record shows that. Prior to that you say you heard nothing about it?

A. No, sir. At that time it came like a bolt out of a clear sky, and was a surprise to the company."

We supplement this with the elaborate abstract of title prepared by Hazard & Wilson, attorneys and abstractors (Defendant's Exhibits 207-8), and the opinion of Hazard & Wilson (Defendant's Exhibits 209-211-213-219).

Loggie, complainant's star witness, testifies to the ability of Hazard & Wilson and says this abstract and opinion was in the company's possession in his time. It will be noted that in the opinion, while with great care every defect discovered in the title is pointed out, this pretended limitation is not referred to. That the company dealt with this title in good faith and reputable attorneys certified the title to be good appears from the testimony of M. J. Kinney, witness on behalf of the Government, who says (pages 320, 321 and 322, printed Abstract):

"Q. During the course of your business was your attention called to the land known as the Coos Bay Wagon Road grant lands?

A. Yes, sir.

Q. Extending from Roseburg to Coos Bay?

A. Yes.

Q. When was that first brought to your attention?

A. In January or February of 1902.

Q. I mean the very first time?

A. The first time that the Coos Bay property was brought to my attention was in—I will get it in a few minutes—I think it was 1870; it may have been 1872.

Q. In what way was it brought to your attention?

A. Father spoke to me about it, the Southern Oregon land grant—or as it was at that time, it was the Coos Bay Wagon Road grant, and he thought at the price that he was offered it by Hen Owens of Roseburg it was a good buy, and we considered it. I was living then in San Francisco. I had some money and had enough to pay for my part of it.

Q. At what price was it offered at that time?

A. It was offered to us at $30,000.

Q. Was that for the entire grant?

A. There was about 100,000 acres, but I do not remember the exact amount. The entire land grant at that time. Hen Owens and old Hamilton was in it.

Q. Did you negotiate for its purchase at that price?

A. Yes, sir.

Q. How far did the negotiations proceed; state fully.

A. Well, I came from San Francisco and my father and Mr. Gray examined into the land; I was living at San Francisco and—

Q. What Mr. Gray; what is his full name?

A. I think his full name is G. W. Gray.

Q. Where did he live?

A. He lived in Salem.

Q. Is he now living?

A. No, he is not living. I think his son is living in Seattle. He has a daughter living here in Portland, and each was to take one-third, and my father and I agreed to take one-third each and Mr. Gray was to take one-third, and after having it under consideration for some time, looking into it, Mr. Gray said that the taxes would ruin us, and on account of that we turned it down, or he turned down his third part of it.

Q. Mr. Gray declining to go into it, did you and your father further consider it?

A. No, we did not."

Mr. Kinney testifies that he had an option later on and purchased the property from the Southern Oregon Company, paying $60,000 down, balance to be paid on deferred payments, but he failed to conclude the transaction and the deal fell through because afterwards the title was questioned, but at the time he purchased it, on or about the 15th day of January, 1903, his attorneys advised him that the title was good. We quote from page 23 of the testimony:

"Q. At the time you bought did you have the advice of attorneys as to the title?

A. I did; I paid Mr. Greene $2,300 for his opinion.

Q. Did they advise you of this condition in the grant?

A. They did not.

Q. Providing for the sale of the land in quarter-section tracts at $2.50 an acre?

A. *They did not. They assured me the title was perfect.*"

LANDS COULD NOT BE SOLD IN 160-ACRE TRACTS—THE PRETENDED CONDITION IS THEREFORE OBNOXIOUS TO THE GRANT AND VOID.

The question whether the land embraced in the grant could be sold in 160-acre tracts becomes important in this case, because if it should appear that such sales could not be made at all, then the pretended condition is obnoxious to the grant and void under all the authorities. That the land could not be thus sold is conclusively shown by the defendant's witnesses. We will not encumber this brief on the facts by quoting all the testimony, but will content ourselves by giving the pages where it may be found, quoting only sufficient testimony to give the court an idea of its general character. We refer the court to the testimony of T. W. Newland, who has lived in "Ten Mile," a part of the grant, ever since 1853. His testimony on the subject is found on pages 222, 223 and 224, printed Abstract:

"That he lived at Ten Mile, about eighteen miles southwest of Roseburg, and had lived there and in that vicinity since 1853. That he was familiar with the character of the land lying between Roseburg and the summit of the mountains, between Roseburg

and Coos Bay, and particularly with the Coos Bay Wagon Road Grant lands. That in his judgment, between 1869 and 1875, the said Coos Bay Wagon Road Grant lands, being the lands title to which is involved in this suit, could not be sold in 160-acre tracts to anyone. That he never heard of anyone wanting or offering anything for it. That land in that neighborhood and of that character was not generally called for until about 1900, when the land speculators began to come in there. This demand for land was made by timber speculators and not for settlement, except in small tracts where it could be cultivated.

Touching the character of the land and its value, this witness testified as follows:

Q. I will ask you to state to the examiner what proportion of that land, in your judgment, is cultivatable land and what proportion is rocky and barren?

A. Well, take the Coos Bay road land, that is what you want to know—there is Government land along where the road is laid—at that time it was—all that wasn't occupied then was all poor quality and wasn't, *I don't think, one good acre out of a thousand would be farm land to me;* it is hilly, little spots where there is a creek or two on the creek bottom that is good and then there is so much that is no good at all.

Q. I will ask you now, Mr. Newland, if in 1869 to 1875 that land that you designate so could be sold in 160-acre tracts to anybody for any purpose?

Mr. Smith: Objected to as immaterial, irrelevant and incompetent and ask that these objections apply to all questions put to this witness.

Mr. Gearin: Yes, that will apply to everything?

Q. What do you say as to that, Mr. Newland?

A. Could it be sold?

Q. Yes.

A. I do not think so, because I do not know of anybody wanting it, or offering anything for it.

Q. Was it sold or taken by anybody up until about fifteen years ago?

A. Not that I know of. The first call for land in the hills was for the timber cruisers. They located fellows on good timber and poor timber and where there was not any at all.

Q. Well, when did that influx of people begin?

A. O! it seems to me it is something about fifteen years ago, twelve or fifteen.

Q. The land speculators brought them in there, did they?

A. Yes; timber cruisers, fellows hunting timber.

Q. And up to that time neither the Government land, nor the Coos Bay lands was taken up at all, was it, by anyone?

A. No, there was a whole lot lying vacant. I never heard or knew of anybody to take up the rough part. There was little places of course where it was taken up for a while and they could not make a living, and they would go again."

J. P. Stemler, a witness called for the defendant, testified as follows (p. 224, Printed Abstract):

"That he lives at Myrtle Point. That he came there first in 1884 and lived there for twenty-five years, and took up a homestead and has remained there ever since. That he is familiar with the character of the land included in the grant of the Coos Bay Wagon Road Company's grant—the lands to which title is involved in this suit. That ever since 1885 there was no demand for timber in that section of the country, or of the lands of the Coos Bay Wagon Road Company's grant. That throughout that section of the country the timber was considered a nuisance and the settlers cut it down and burned it off to get rid of it and clear the land. That during the time he was there, from 1885, the timber land within the limits of the grant on the mountains could not be sold in 160 acre tracts to anyone at any figure.

He further said that he had heard the restrictive provisions of the grant mentioned among the people and read in the papers that the lands had to be sold at $2.50 an acre, in tracts of 160 acres. That mountain timber land could not be sold in 160 acre or smaller tracts, but that he had never attempted to sell any such land except during the last three or four years. As to his knowledge of the character of the lands, he said that it was gained from traveling over the Wagon Road, from which but little of the land could be seen, because of the trees."

W. Z. Cotton, a witness called for the defendant, testified as follows (pp. 225-6, Abstract of Record):

"That he lives at Fairview, in the neighborhood of the Coos Bay Wagon Road Land Grant lands, and has lived there since 1870. That he took up a claim there in 1882. That he was familiar with the character of the land embraced in the Coos Bay Wagon Road Land Grant as to its being bottom land, or hill and timber land. That the greater proportion would be hill land. That there would not be over 20 per cent of it bottom land. That the hills are covered with timber. That during the early days, after he settled there in 1882, there was no demand for timber and no demand arose until about 1900. That in 1870 and for several years thereafter the timber land in the grant could not be sold in 160 acre tracts to anybody at any price. This witness further testified that he filed pre-emption claim on 120 acres in the neighborhood. That he held it for a few years and paid taxes on it; that he offered it for sale to anyone who would pay for making out the deed for the property (80 acres), and nobody would take it."

John F. Hall, a witness on behalf of the defendant, testified as follows (pp. 226-7, printed Abstract):

"That he is County Judge of Coos County and has been County Judge for eight years. That before that he was County Surveyor from 1882 to 1886.

That he came to settle in Coos County in 1869 before the wagon road was built. That he settled on the middle fork of the Coquille, and in 1871 moved down to Coos Bay on the Isthmus Slough. That when he settled in there the only communication between Roseburg and Marshfield was by means of a pack trail over the mountains. That during the time and before the wagon road was built there was no mail communication except that the mail was carried once a week by a man on horseback. That during the years 1882 and 1886 he was Deputy Government Surveyor and surveyed on both sides of the Coos Bay Wagon Road Company's Grant, and generally throughout that country was familiar with the land and the character of it. That during the early years following his settlement in 1869 there was no demand for the timber land in the grant. That no demand arose for it until about 1885 or 1886.

I do not think that the mountain land where the heavy timber is, could have been sold in quarter section lots or smaller parcels for cash from 1870 up to '80. That between the years 1870 and 1880, he did not think the mountain land could have been sold at any price, but that after the lands had been transferred to the Oregon Southern Improvement Company, there were a number of people who wanted to purchase and were willing to pay $2.50 an acre, but were unable to secure the land."

L. D. Smith, a witness on behalf of the defend-

ant, testified as follows (pp. 228-29, printed Abstract):

"That he lives on Coos River in Coos County and has lived there since 1865, and was there when the Coos Bay Wagon Road Company's wagon road was built. That prior to the building of that road the only communication between Marshfield and Roseburg was by a row boat or canoe from Marshfield to the head of South Coos River and by pack trail from there over the mountains to Roseburg. That there was no road over the mountains until the wagon road was built. That during the years from 1865 to the present he had been over a great portion of the country embraced within the limits of the grant and the adjoining country and was familiar with the character of the country and its soil, etc., and as to its being hilly or covered with timber, or otherwise. That there was bottom land on the grant and hilly, rocky and timber land. That the proportion of bottom land was very small. Witness could not even make a guess of the percentage of it. That the land along the creek bottoms was very good land and the balance, lying on the hills was timber land and some of it barren and rocky. That up to 1875 the land on the hills could not have been sold to anyone for any sum. That no one attempted to buy any of it or to take it up and it was not considered worth anything. That as to the timber, the principal desire of settlers was to burn it up and get rid of it, prior to 1883, there being no demand for it, but after that, a lively demand was developed. That he had

been over a portion of the lands embraced within the limits of the grant, but had never made an examination for the purpose of classifying it."

Whereupon defendant and appellant called D. J. Thrift, who testified (pages 229-230, printed Abstract of Record), that he was County Assessor of Coos County and had been such for the last twelve years and has lived in Coos County for twenty-four years. That up to the year 1900 there was no demand for timber on the lands in the vicinity of Coos Bay Wagon Road Grant, or the lands embraced in the grant. That the first timber buyers came into the country about 1900. That up to that time there was no demand for the timber at all, except a small demand by local buyers and the lands up to that time had no marketable value. That in his judgment there would be possibly 3,000 acres of bottom land in the grant. The balance of the land might be designated timber land, part of it barren. About one-half a township would be barren and rocky. The balance of the grant outside of the bottom land and the barren, rocky worthless land, he designated as lands covered with timber and chiefly valued for timber. That the timber land prior to the advent of timber buyers about the year 1900 "was absolutely worthless, almost," and was assessed as low as 10 cents an acre.

Whereupon defendant and appellant called J. D. Benham, who testified in substance as follows (pages 230-231, printed Abstract of Record):

"That he lives at Fairview, in Coos County, and has lived there since 1875. That he has been over the lands of the Coos Bay Wagon Road Grant a great many times and is familiar with the nature of the country and the character of the land embraced in the grant. That the great body of the grant is timber land and only a small proportion bottom land. That from 1870 up to 1880 there was no demand for timber land in that county. The timber land could not, in that county, within the limits of the grant and adjoining lands, be sold to anybody for cash at any figure. That he did not know of anyone buying any, or attempting to buy any. That some of the timber land is barren and rocky, without even timber on it. That of late years there has grown up a demand for the timber and all the adjoining land, being timber land, has been taken for the timber."

E. P. Mast, a witness *called on behalf of the complainant*, testified that he went into the Coos Bay country in 1872, bought his place from the company and had no trouble about it. As to the character of the land he says (pages 247-248, Abstract of Record):

"A. Well, of course it is mountains and rocks and timber and everything else; of course only along the creeks and the river bottoms—it is all mountains and rocks and hills, of course.

Q. I will ask you to state, Mr. Mast, if in your judgment in 1872 or up to 1875 that land on the

mountain could be sold for real money to anybody?

A. *It could not have been sold to me them days for nothing; I would not have taken it as a gift.*

Q. Could it be sold in 160 acre tracts or smaller tracts to anybody for cash money?

A. Well, as far as I know they could not, because there was no demand for timber and the hills would not have been worth anything at all to a man living on them, there was nothing only them mountains and rocks, couldn't make anything out of it."

As to the ability to sell 160 acre tracts Robert E. Shine says (p. 296, printed Abstract):

"Q. I will ask you to state whether or not in 1888 when you went there in the employ of the company, the land on the mountains—the timber land—could be sold in 160 acre tracts or smaller tracts to anybody at any price?

A. Not at any price, Mr. Gearin. Money was very scarce in those days, and there was no demand that I ever knew of for timber land."

J. A. Yoakam, answering as to the possibility of selling the land in 160-acre tracts, says (p. 283, printed Abstract):

"Q. Now, Mr. Yoakam, after you got back a mile or a mile and a half from the sloughs or navigable waters where you could log advantageously, I will ask you if the balance of that grant running over to the hillside and being timbered and rocky could have been sold at that time for $2.50 an acre

and in 160 acre tracts, or for any sum in any quantities?

A. I have been offered for that land—

Q. Answer yes or no.

A. The best way to answer, I have been offered $1.00 an acre for any section I would take or half section or quarter section and—

Q. You can answer the question. Could it have been sold to anyone?

A. No, it could not. You could take up any timber anywhere, take up government land for nothing where it wasn't surveyed at all."

L. A. Lawhorn lives near McKinley, within the limits of the grant, and has lived there since 1861. His testimony on this subject is found on pages 231-232, printed Abstract.

H. W. Halverstott lives at Fairview, within the limits of the grant, and has lived there since 1873. His testimony on this subject is found on pages 232-233, printed Abstract.

George Norris lives at Fairview, within the limits of the grant, and has lived there since 1868. His testimony on this subject is found on pages 234-235, printed Abstract.

Albert E. Bettis lives in Fairview, within the limits of the grant, and has lived there since 1874. His testimony on this subject is found on pages 235-236, printed Abstract.

William Bettis lives at McKinley, within the

limits of the grant, and has lived there since 1874. His testimony on this subject is found on pages 237-238, printed Abstract.

J. C. Haynes lives at Myrtle Point, within the limits of the grant. Has lived there since March, 1859. His testimony on this subject is found on pages 238-239, printed Abstract.

L. E. Rose lives at Myrtle Point. Has lived there since 1890. His testimony on this subject is found on pages 240-241, printed Abstract.

J. J. Clinkenbeard lives on Coos River near mouth of Daniels Creek and has lived there since 1880. His testimony is found on pages 241-242, printed Abstract.

S. A. Gurney also lived on land included in the grant from 1853. His testimony with reference to this point is found on page 243, printed Abstract.

W. J. Coats lives at "Ten Mile." Has lived there since 1861. His testimony on this subject is found on pages 244-245, printed Abstract.

A. E. Bushnell lives at Reston, within the limits of the grant, and has lived there for 13 or 14 years. His testimony is found on pages 245-246, printed Abstract.

The Court will find on examination that all the witnesses above referred to testify to practically the same condition shown by the quoted testimony.

Of course this testimony does not apply to the lands in the bottoms along the creeks and streams and contiguous to the sloughs, Isthmus, Catching, etc. This portion of the grant was valuable, but its area was limited, a very small percentage of the whole grant consisting of bottom lands.

This testimony is conclusive and satisfies the mind that at the time of the grant, March 3, 1869, and for many years thereafter, this land, because of its character and location, could not be sold in 160 acre tracts to anyone at any price.

RECORDS OF LAND OFFICE.

If the reading of the testimony left any doubt in our mind, an examination of the records of the Roseburg Land Office would set that doubt at rest. We call the Court's attention to exhibits from one to fourteen. These exhibits, taken together, constitute a complete record of the Government's *even* sections within the boundaries of the grant. The original exhibits are not printed in the Abstract of Record but are here by order of the Court. For the Court's convenience we have tabulated the results deducible from these exhibits and present them herewith. They are identified by H. O. Pargeter (p. 315, printed Abstract) and the showing by townships is as follows:

TOWNSHIP 28 SOUTH, RANGE 7 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	....	....	1867	160	..
4	....	....	1909	80	..
4	....	....	1883	80	..
4	1913	1913	1913	40	..
4	....	....	1871	40	..
4	....	....	1870	40	..
6	1884	1889	1889	160	..
6	....	....	1889	40	..
6	....	....	1908	40	..
6	....	....	1871	160	..
6	....	....	1877	80	..
6	....	....	1900	80	..
6	....	....	1911	80	..
8	....	....	1908	80	..
8	....	....	1908	40	..
8	....	....	1908	40	..
8	....	....	1871	80	..
8	....	....	1901	160	..
8	1912	1913	....	...	80
8	....	....	1873	40	..
10	....	....	1868	160	..
10	....	....	1885	160	..
14	1909	1913	1913	99.48	..
14	....	....	1876	159.41	..
14	....	....	1913	40	..
14	1913	1913	....	...	80
14	1901	1904	1906	19.93	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	....	....	1865	241.38	..
18	....	....	1912	40	..
18	....	....	1876	160	..
18	....	....	1908	120	..
18	1907	1908	1906	160	..
18	....	....	1911	160	..
20	1910	1910	1910	160	..
20	1910	1912	....	...	160
20	1908	1912	1912	160	..
20	....	....	1898	160	..
22	....	....	1913	160	..
22	....	....	1872	40	..
22	....	....	1883	160	..
24	....	....	1873	240	..
24	....	....	1885	26.80	..
24	....	....	1908	26.80	..
24	....	....	1870	160	..
26	....	....	1865	160	..
26	....	....	1884	120	..
26	....	....	1910	40	..
26	....	....	1872	160	..
26	....	....	1891	80	..
26	....	....	1873	80	..
28	....	....	1864	240	..
28	....	....	1898	34	..
28	....	....	1872	270	..
28	....	....	1871	60	..
30	....	....	1909	160	..
30	....	....	1888	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
30	....	....	1872	80	..
32	....	....	1902	80	..
32	....	....	1872	40	..
32	1908	1908	....	...	80
34	....	....	1870	161.92	..
34	....	....	1865	120	..
34	....	....	1865	266	..
34	....	....	1866	93	..

Recapitulation

Number of entries made prior to 1875 23
Number of entries made between 1875 and 1880.. 3
Number of entries made between 1880 and 1890.. 9
Number of entries made since 1890.....26

Total entries 61

TOWNSHIP 28 SOUTH, RANGE 8 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1878	158.63	..
2	....	....	1904	158.65	..
2	1903	1904	1907	120	..
2	1903	1904	1907	40	..
2	1877	1885	1890	160	..
4	1903	1903	1906	80	..
4	....	....	1906	80	..
4	1903	1903	1906	160	..
4	....	....	1906	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	1903	1903	1908	160	..
4	1903	1904	1906	80	..
4	1890	1890	1901	162.33	..
4	1889	1890	1901	200.16	..
4	....	....	1901	318.15	..
4	1903	1903	....	...	160
4	1890	1891	1901	320	..
4	1903	1903	1908	160	..
10	....	....	1909	120	..
10	1903	1903	....	...	80
10	1903	1903	1908	160	..
10	....	....	1885	160	..
10	1912	1913	1913	40	..
10	....	....	1887	80	..
12	....	....	1877	40	..
12	1879	1884	1891	160	..
12	....	....	1875	80	..
12	....	....	1906	160	..
12	....	....	1870	40	..
12	1902	1906	1909	120	..
14	....	....	1872	160	..
14	....	....	1865	320	..
14	....	....	1865	80	..
14	1910	1911	1912	80	..
18	1890	1891	1901	160	..
18	....	....	1901	160	..
18	1889	1889	1901	160	..
18	1890	1891	1901	160	..
20	....	....	1890	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
20	....	....	1904	160	..
20	1889	1890	1890	160	..
20	....	....	1890	160	..
22	....	....	1903	131.96	..
22	....	....	1873	120	..
22	....	....	1897	160	..
22	1908	1909	1913	40	..
22	1890	1891	1903	160	..
24	1890	1890	....	...	320
24	....	....	1872	80	..
24	....	....	1864	160	..
24	....	....	1870	40	..
24	....	....	1869	40	..
26	1890	1891	1903	160	..
26	1890	1891	1904	160	..
26	1890	1891	1904	160	..
26	1890	1891	1904	160	..
28	1890	1891	1904	160	..
28	1902	1902	1906	120	..
28	1899	1908	1909	120	..
28	....	....	....	...	40
28	....	....	1910	40	..
28	1890	1896	1903	160	..
30	1902	1907	1908	160	..
30	....	....	1903	160	..
30	....	....	1903	164.13	..
30	....	....	1897	160	..
32	....	....	1889	160	..
32	....	....	1887	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
32	....	....	1887	160	..
32	1893	1901	1902	160	..
34	....	....	1904	160	..
34	1890	1891	1903	160	..
34	1890	1891	1903	160	..
34	1890	1891	1907	160	..

Recapitulation

Number of entries made prior to 1875.....10
Number of entries made between 1875 and 1880.. 3
Number of entries made between 1880 and 1890.. 5
Number of entries made since 1890.....52

Total entries 70

TOWNSHIP 29 SOUTH, RANGE 8 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1875	77.38	..
2	....	....	1889	153.91	..
2	....	....	1907	160	..
2	....	....	1910	40	..
2	....	....	1876	80	..
2	....	....	1907	120	..
4	....	....	1903	155.69	..
4	....	....	1903	114.35	..
4	1890	1890	1906	200	..
4	....	....	1890	160	..
6	....	....	1888	156.33	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
6	....	....	1871	161.54	..
6	1879	1880	1882	40	..
6	....	....	1893	40	..
6	....	....	1875	160	..
6	....	....	1898	40	..
6	....	....	1881	40	..
8	....	....	1890	160	..
8	1885	1892	1900	160	..
8	....	....	1871	120	..
8	1913	1913	....	...	40
8	1876	1877	1892	80	..
8	....	....	1892	80	..
8	1909	1910	1913	40	..
8	1902	1903	1907	160	..
8	....	....	1901	160	..
8	....	....	1895	160	..
8	1903	1906	1908	80	..
8	....	....	....	...	40
12	1878	1883	1908	80	..
12	1879	1883	1908	80	..
12	1903	1904	1906	160	..
12	....	....	1906	160	..
12	....	....	1881	80	..
12	....	....	1893	80	..
14	....	....	1871	160	..
14	....	....	1908	40	..
14	....	....	1876	160	..
14	1876	1879	1881	80	..
14	....	....	1890	40	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	....	....	1903	160	..
18	....	....	1864	320	..
18	....	....	....	...	320

Recapitulation

Number of entries made prior to 1875..... 4
Number of entries made between 1875 and 1880.. 4
Number of entries made between 1880 and 1890.. 9
Number of entries made since 1890.....23

Total entries 40

TOWNSHIP 28 SOUTH, RANGE 9 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1890	163.11	..
2	1889	1889	1890	163.53	..
2	1889	1890	1890	160	..
2	1889	1890	1890	160	..
4	....	....	1901	243.33	..
4	....	....	1908	162.52	..
4	1904	1907	....	...	40
4	....	....	1909	80	..
6	1889	1890	1907	164.20	..
6	....	....	1890	165.32	..
6	....	....	1890	160	..
6	....	....	1890	171.76	..
8	1903	1903	1904	160	..
8	1903	1903	1904	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
8	1903	1903	1904	160	..
8	1903	1904	1904	160	..
10	1890	1891	1902	160	..
10	1902	1903	1904	160	..
10	1902	1903	1904	160	..
10	1890	1891	1903	160	..
12	1889	1890	1890	160	..
12	....	....	1901	480	..
14	1889	1890	1890	160	..
14	1889	1890	1890	160	..
14	1889	1890	1890	160	..
14	1889	1890	1890	160	..
18	....	....	1890	160	..
18	....	....	1907	174.28	..
18	1889	1890	1890	175.32	..
18	1889	1890	1890	160	..
20	1890	1891	1901	120	..
20	1889	1890	1901	80	..
20	1890	1891	1901	80	..
20	1889	1890	1901	80	..
20	1890	1891	1904	80	..
20	1906	1907	1908	160	..
20	....	....	1909	40	..
22	1890	1898	1900	160	..
22	1890	1898	1900	160	..
22	1889	1890	1901	160	..
22	1889	1890	1900	160	..
24	1889	1890	1890	160	..
24	1889	1890	1890	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
24	1889	1890	1890	160	..
24	1889	1890	1890	160	..
26	1890	1891	1900	160	..
26	1890	1891	1900	160	..
26	1890	1891	1900	160	..
26	1890	1891	1900	160	..
28	1890	1891	1900	160	..
28	1890	1891	1900	160	..
28	....	....	1890	160	..
28	....	....	1890	160	..
30	....	....	1908	167.27	..
30	1890	1891	1904	167.33	..
30	....	....	1890	174.64	..
30	....	....	1890	160	..
32	1889	1898	1900	160	..
32	....	....	1890	160	..
32	....	....	1890	160	..
32	1889	1898	1900	160	..
34	....	....	1900	160	..
34	1890	1891	1900	160	..
34	1890	1890	1900	160	..
34	....	....	1890	160	..

Recapitulation

Number of entries made prior to 1875	0
Number of entries made between 1875 and 1880	0
Number of entries made between 1880 and 1890	0
Number of entries made since 1890, not cancelled	65
Total entries	65

TOWNSHIP 29 SOUTH, RANGE 9 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1902	157.98	..
2	....	....	1902	159.18	..
2	....	....	1903	120	..
2	....	....	1888	40	..
2	1902	1902	1909	160	..
4	1889	1889	1900	160	..
4	1889	1889	1900	154.07	..
4	....	....	1900	160	..
4	....	....	1889	160	..
6	....	....	1890	153.40	..
6	1890	1890	1907	169.92	..
6	....	....	1890	173.29	..
6	....	....	1890	160	..
8	....	....	1890	40	..
8	1889	1889	1889	120	..
8	....	....	1890	160	..
6	1890	1898	1900	160	..
8	1902	1902	1903	160	..
10	1902	1902	1906	160	..
10	....	....	1890	120	..
10	1889	1890	1890	160	..
10	1889	1889	1890	40	..
10	....	....	1903	160	..
12	....	....	1880	160	..
12	....	....	1870	120	..
12	....	....	1886	160	..
12	....	....	1870	200	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	....	....	1890	160	..
14	1892	1899	1908	160	..
14	....	....	1908	40	..
14	....	....	1902	120	..
14	....	....	1903	160	..
14	....	....	1910	160	..
16	1910	1912	1913	80	..
16	1902	1902	1903	131.11	..
16	1911	1912	1913	160	..
16	1910	1912	1912	168.37	..
16	....	....	1909	80	..

Recapitulation

Number of entries made prior to 1875..... 2
Number of entries made between 1875 and 1880.. 2
Number of entries made between 1880 and 1890.. 2
Number of entries made since 1890.....35

Total entries 41

TOWNSHIP 28 SOUTH, RANGE 10 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1907	161.36	..
2	....	....	1908	162.12	..
2	....	....	1881	160	..
4	1906	1907	1909	165.60	..
4	1903	1904	1908	166.40	..
4	1907	1908	1909	80	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	1890	1891	1907	80	..
4	1908	1908	....	...	80
4	1903	1904	1907	80	..
6	....	....	....	...	135.42
6	....	....	1908	84.90	..
6	....	....	1907	155.46	..
6	....	....	1884	84.54	..
6	1880	1880	1882	160	..
6	....	....	1909	40	..
8	....	.....	1907	80	..
8	1890	1890	....	160	..
8	1906	1906	1907	80	..
8	1906	1907	1907	60	..
10	....	....	1903	80	..
10	....	....	1909	80	..
10	....	....	1909	80	..
10	....	....	1876	80	..
10	....	....	1876	160	..
10	....	....	1879	160	..
12	....	....	1907	80	..
12	....	....	1881	160	..
12	....	....	....	...	40
12	....	....	1902	80	..
12	1902	1902	1903	160	..
12	....	....	1907	120	..
14	1903	1904	1907	160	..
14	1890	1891	....	...	80
14	1908	1908	....	...	80
14	1908	1908	....	...	80

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	1906	1907	....	...	80
14	1903	1904	1907	160	..
18	1890	1891	1907	160	..
18	1890	1891	....	...	160
18	1890	1891	....	...	160
18	1903	1904	....	...	160
18	1903	1904	1907	160	..
20	1903	1904	1907	160	..
20	1903	1904	1907	120	..
20	....	....	....	...	40
20	1890	1891	....	...	160
20	1890	1891	....	...	160
22	1903	1904	1907	...	160
22	....	....	1907	160	..
22	1890	1891	....	...	160
22	1890	1891	1903	...	160
24	1890	1891	....	...	160
24	....	....	1891	160	..
24	....	....	1891	160	..
24	....	....	1891	160	..
26	....	....	1891	160	..
26	1890	1891	1903	160	..
26	1890	1890	1907	160	..
26	1908	1908	1913	160	..
28	1890	1901	....	...	360
28	1901	1901	....	...	80
28	1901	1901	1904	200	..
30	1902	1911	1913	160	..
30	....	....	....	...	480

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
32	1890	1891	1908	40	..
32	1890	1891	1909	40	..
32	1906	1907	....	...	80
32	1904	1904	1906	160	..
32	1901	1901	1901	160	..
32	1891	1891	1901	160	..
34	1890	1891	....	...	280
34	1890	1891	1903	160	..
34	1890	1891	1903	80	..
34	1904	1904	....	...	80
34	1890	1891	....	...	40

Recapitulation

Number of entries made prior to 1875..... 0
Number of entries made between 1875 and 1880.. 3
Number of entries made between 1880 and 1890.. 4
Number of entries made since 1890.....47

Total entries 54

TOWNSHIP 29 SOUTH, RANGE 10 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	1902	1904	....	...	280.58
2	....	....	1894	161.52	..
2	....	....	1904	200.94	..
4	1893	1893	1903	161.96	..
4	1893	1893	1913	164.25	..
4	1893	1893	1912	161.43	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	1893	1893	1908	160	..
6	1903	1908	....	...	160
6	1902	1910	....	...	120.48
6	....	....	....	...	361.75
8	1893	1893	1912	160	..
8	1895	1896	1908	160	..
8	1895	1896	1912	160	..
8	1895	1896	1903	160	..
10	1908	1908	1913	160	..
10	1908	1908	1913	160	..
10	....	....	1908	160	..
10	1908	1908	1912	160	..
12	1893	1893	1908	160	..
12	1894	1894	1903	160	..
12	1893	1894	....	...	160
12	1893	1894	1903	160	..
14	1893	1894	....	...	160
14	1893	1894	1908	160	..
14	1907	1908	....	160	..
14	....	....	1889	160	..
18	1893	1894	1907	160	..
18	....	....	1901	120	..
18	....	....	1904	40	..
18	....	....	1903	160	..
18	....	....	....	...	160

Recapitulation

Number of entries made prior to 1875..... 0
Number of entries made between 1875 and 1880.. 0
Number of entries made between 1880 and 1890.. 1
Number of entries made since 1890.....22

Total entries 23

TOWNSHIP 27 SOUTH, RANGE 11 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	....	....	1889	88.57	..
4	....	....	1884	87.33	..
4	....	....	1906	160	..
4	....	....	1902	160	..
6	....	....	1891	162.92	..
6	....	....	1903	81.21	..
6	....	....	1901	80.71	..
6	....	....	1884	162.87	..
6	....	....	1877	160	..
8	....	....	1901	160	..
8	....	....	1901	160	..
8	....	....	1901	160	..
8	....	....	1885	160	..
18	1878	1880	1888	161.70	..
18	....	....	1878	161.66	..
18	....	....	1907	120	..
18	1876	1880	1881	81.62	..
18	....	....	1885	121.58	..
20	....	....	1902	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
20	1902	1903	1903	160	..
20	....	....	1902	160	..
20	....	....	1902	160	..
22	....	....	1900	160	..
22	....	....	1903	160	..
28	....	....	1898	80	..
28	....	....	1885	160	..
28	1880	1882	1888	120	..
28	1885	1886	1888	40	..
28	1878	1882	1885	40	..
28	1876	1878	1885	120	..
28	....	....	1902	80	..
30	....	....	1902	160	..
30	1897	1903	1904	160	..
30	....	....	1902	160	..
30	....	....	1902	160	..
32	....	....	1903	80	..
32	....	....	1889	80	..
32	....	....	1903	80	..
32	1902	1904	1904	80	..
32	1890	1891	1903	40	..
32	1885	1888	1891	160	..
32	....	....	1889	40	..
32	....	....	1878	80	..
34	....	....	1884	160	..
34	1888	1890	1895	160	..
34	....	....	1880	40	..
34	....	....	1880	160	..
34	1902	1907	1912	120	..

Recapitulation

Number of entries made prior to 1875..... 0
Number of entries made between 1875 and 1880.. 3
Number of entries made between 1880 and 1890..17
Number of entries made since 1890.....28

Total entries 48

TOWNSHIP 28 SOUTH, RANGE 11 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1891	153.11	..
2	1891	1899	1906	143.71	..
2	....	....	1907	160	..
2	....	....	1903	160	..
4	....	....	1880	37.18	..
4	....	....	1878	155.41	..
4	....	....	1865	158.23	..
4	....	....	1890	120	..
4	....	....	1908	40	..
4	....	....	1904	120	..
6	....	....	1885	84.32	..
6	1899	1902	1910	162.92	..
6	1903	1906	1908	164.53	..
6	....	....	1907	81.33	..
6	....	....	1901	152.10	..
8	....	....	1907	80	..
8	1881	1887	1888	80	..
8	1878	1883	1906	80	..
8	1890	1891	1906	80	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
8	1890	1891	1903	160	..
10	....	....	1886	160	..
10	....	....	1908	40	..
10	....	....	1909	80	..
10	....	....	1890	120	..
10	....	....	1882	160	..
10	....	....	1881	40	..
10	1903	1904	1904	40	..
12	1887	1890	1891	160	..
12	....	....	1881	160	..
12	....	....	1878	160	..
12	....	....	1878	160	..
14	1891	1892	1900	160	..
14	....	....	1894	160	..
14	....	....	1901	160	..
14	....	....	1913	160	..
18	1890	1891	1903	160	..
18	1906	1908	1913	160	..
18	1908	1908	....	...	40
18	1890	1891	1913	120	..
18	1900	1905	1911	160	..
20	1890	1894	1900	160	..
20	1877	1882	1892	160	..
20	1900	1901	1907	160	..
20	....	....	1888	154.54	..
22	1900	1901	1909	160	..
22	....	....	1882	190.02	..
22	....	....	1878	104.97	..
22	....	....	1888	150.28	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
24	1891	1899	1911	160	..
24	1890	1891	1913	160	..
24	1890	1891	1913	160	..
24	....	....	1909	160	..
26	1900	1903	1906	160	..
26	....	....	1899	160	..
26	1900	1900	1903	80	..
26	1885	1890	1884	160	..
26	....	....	1909	80	..
28	....	....	1906	80	..
28	....	....	1881	141.51	..
28	....	....	1879	73.87	..
28	....	....	1885	164.80	..
28	....	....	1906	160	..
30	....	....	1907	80	..
30	....	....	1881	140.47	..
30	....	....	1881	107.15	..
30	....	....	1879	133.93	..
30	....	....	1881	153.56	..
32	1907	1907	1908	160	..
32	1890	1891	1912	160	..
32	1911	1912	1908	160	..
32	1890	1891	1908	160	..
34	1890	1891	....	...	80
34	....	....	1908	160	..
34	1890	1891	1908	160	..
34	1908	1910	1913	120	..
34	1890	1891	....	...	40

Recapitulation

Number of entries made prior to 1875..... 0
Number of entries made between 1875 and 1880.. 6
Number of entries made between 1880 and 1890..17
Number of entries made since 1890.....51

Total entries 74

TOWNSHIP 26 SOUTH, RANGE 12 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1913	80	..
2	....	....	1875	81	..
2	....	....	1879	160	..
2	....	....	1889	81.55	..
2	....	....	1877	40	..
2	....	....	....	...	80
2	....	....	1875	120	..
4	....	....	1901	170.70	..
4	....	....	1890	140	..
4	1896	1900	1904	80	..
4	1903	1904	1904	80	..
4	....	....	1889	170	..
6	....	....	1886	112.99	..
6	....	....	1883	39.85	..
6	....	....	1879	157.39	..
6	....	....	1878	153.81	..
6	....	....	1899	120	..
6	....	....	1873	40	..
8	....	....	1879	133.43	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
8	....	....	1892	40	..
8	....	....	1880	40	..
8	....	....	1881	146.72	..
8	....	....	1893	160	..
10	....	....	1898	40	..
10	....	....	1882	80	..
10	1901	1901	1909	160	..
10	....	....	1873	160	..
10	....	....	....	...	40
10	....	....	1875	160	..
12	....	....	1903	60	..
12	1880	1881	1887	160	..
12	1913	1913	....	...	40
12	....	....	1889	40	..
12	1901	1906	1907	160	..
12	....	....	1903	160	..
14	....	....	1891	160	..
14	1879	1882	1887	160	..
14	....	....	1884	160	..
14	....	....	1903	160	..
16	....	....	1874	80	..
18	....	....	1891	40	..
18	....	....	1875	160	..
18	....	....	1891	39.32	..
18	....	....	1891	158.10	..
18	....	....	1873	40	..
18	....	....	1881	160	..
18	....	....	1912	38.78	..
20	....	....	1874	28.64	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
20	....	....	1878	51.17	..
20	....	....	1889	40	..
20	....	....	1872	167.59	..
20	....	....	1875	39.79	..
20	1875	1881	1881	40	..
20	....	....	1874	87.93	..
20	....	....	1878	29.10	..
20	....	....	1877	40	..
22	....	....	1891	160	..
22	1901	1907	1907	160	..
22	....	....	1875	160	..
22	....	....	1884	160	..
24	....	....	1883	160	..
24	....	....	1883	160	..
24	....	....	1883	160	..
24	....	....	1883	160	..
26	....	....	1900	160	..
26	....	....	1883	160	..
26	....	....	1883	160	..
26	....	....	1884	160	..
28	....	....	1878	160	..
28	....	....	1891	40	..
28	....	....	1872	120	..
28	....	....	1874	160	..
28	....	....	1875	160	..
30	....	....	1874	160	..
30	....	....	1877	160	..
30	....	....	1874	160	..
30	....	....	1875	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
32	....	....	1873	120	..
32	....	....	1885	40	..
32	....	....	1873	160	..
32	....	....	1885	40	..
32	....	....	1877	160	..
32	....	....	1873	80	..
32	....	....	1875	40	..
34	....	....	1884	160	..
34	....	....	1884	160	..
34	....	....	1892	160	..
34	....	....	1891	160	..

Recapitulation

Number of entries made prior to 1875 14
Number of entries made between 1875 and 1880..20
Number of entries made between 1880 and 1890..26
Number of entries made since 1890 25

Total entries 85

TOWNSHIP 27 SOUTH, RANGE 12 WEST.

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1902	163.40	..
2	1891	1899	1902	162.20	..
2	1902	1903	1913	160	..
2	1902	1903	1903	160	..
4	....	....	1902	80.41	..
4	....	....	1902	80.32	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
4	1885	1892	1902	80.32	..
4	1885	1892	1902	80	..
4	1885	1892	1902	80	..
4	....	....	1884	166.19	..
4	....	....	1891	160	..
6	1874	1879	1884	160.99	..
6	....	....	1883	161.20	..
6	1879	1882	1883	163.41	..
6	1881	1883	1884	160	..
8	....	....	1876	160	..
8	1874	1879	1883	160	..
8	....	....	1876	160	..
8	....	....	1876	160	..
10	....	....	1891	160	..
10	....	....	1891	160	..
10	....	....	1891	160	..
10	....	....	1891	160	..
12	....	....	1901	120	..
12	....	....	1902	40	..
12	....	....	1877	160	..
12	....	....	1901	120	..
12	....	....	1890	80	..
12	....	....	1901	80	..
12	....	....	1902	40	..
14	....	....	1903	80	..
14	....	....	1877	120	..
14	1875	1877	1885	80	..
14	....	....	1885	40	..
14	1880	1896	1896	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	....	....	1877	120	..
18	....	....	1883	160	..
18	....	....	1874	163.56	..
18	....	....	1881	162.68	..
18	....	....	1883	160	..
20	....	....	1881	80	..
20	1877	1883	1884	160	..
20	....	....	1876	160	..
20	....	....	1872	160	..
20	....	....	1891	80	..
22	1875	1882	1890	160	..
22	1902	1902	1903	160	..
22	1901	1904	1904	160	..
22	....	....	1902	160	..
24	....	....	1875	80	..
24	....	....	1883	160	..
24	....	....	1874	160	..
24	....	....	1879	160	..
24	....	....	1896	80	..
26	....	....	1883	160	..
26	....	....	1883	120	..
26	....	....	1882	160	..
26	....	....	1876	80	..
26	....	....	1880	120	..
28	....	....	1908	160	..
28	....	....	1892	160	..
28	1890	1893	1898	160	..
28	....	....	1891	160	..
30	1873	1880	1883	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
30	....	....	1889	42.05	..
30	....	....	1873	162.90	..
30	....	....	1874	40	..
30	....	....	1881	80	..
30	....	....	1881	80	..
30	....	....	1875	80	..
32	1889	1891	1903	160	..
32	....	....	1878	160	..
32	1885	1888	1899	80	..
32	1888	1889	1899	80	..
32	....	....	1889	160	..
32	....	....	1884	160	..
32	....	....	1890	160	..
32	....	....	1885	160	..
32	1884	1884	1885	160	..

Recapitulation

Number of entries made prior to 1875 5
Number of entries made between 1875 and 1880..12
Number of entries made between 1880 and 1890..26
Number entries made since 1890 35

Total entries 78

TOWNSHIP 28 SOUTH, RANGE 12 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1883	168.90	..
2	1886	1888	1890	169.10	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1887	178.80	..
2	....	....	1887	160	..
4	....	....	1891	102.60	..
4	1886	1889	1899	89.81	..
4	....	....	1890	80	..
4	1885	1893	1898	80	..
4	1886	1893	1898	80	..
4	....	....	1890	160	..
6	1882	1884	1887	163.72	..
6	1883	1883	1886	160	..
6	....	....	1876	162.26	..
6	....	....	1876	158.48	..
8	1884	1886	1890	160	..
8	....	....	1896	40	..
8	....	....	1881	120	..
8	....	....	1891	160	..
8	....	....	1893	160	..
10	....	....	1890	160	..
10	1891	1894	1901	160	..
10	1902	1906	1912	80	..
10	....	....	1891	160	..
10	....	....	1883	80	..
12	....	....	1878	172.12	..
12	....	....	1876	114.68	..
12	....	....	1894	132.10	..
12	....	....	1878	138.65	..
12	....	....	1899	80	..
14	....	....	1883	63.99	..
14	....	....	1877	62.76	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
14	....	....	1876	105.98	..
14	1880	1884	1891	160	..
14	....	....	1899	157.74	..
14	....	....	1891	80	..
18	....	....	1884	80	..
18	....	....	1866	120.95	..
18	....	....	1873	58.70	..
18	....	....	1862	72.40	..
18	....	....	1878	160	..
18	....	....	1886	80	..
18	....	....	1883	40	..
20	....	....	1892	120	..
20	....	....	1887	160	..
20	....	....	1882	160	..
20	....	....	1890	160	..
20	....	....	1888	40	..
22	....	....	1881	154.20	..
22	....	....	1890	152.64	..
22	....	....	1892	120	..
22	....	....	1894	150.64	..
24	1907	1907	1908	40	..
24	....	....	1907	159.64	..
24	....	....	1887	160	..
24	....	....	1908	40	..
24	....	....	1883	169.09	..
24	....	....	1887	59.51	..
26	....	....	1896	160	..
26	1882	1884	1890	160	..
26	....	....	1896	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
26	....	....	1884	145.76	..
26	....	....	1879	8.95	..
28	....	....	1887	80	..
28	....	....	1880	80	..
28	....	....	1893	40	..
28	1886	1886	1893	200	..
28	1886	1887	1897	90	..
28	1886	1886	1891	160	..
28	....	....	1875	40	..
28	....	....	1868	40	..
28	....	....	1870	130.41	..
28	....	....	1868	40	..
28	....	....	1880	160	..
28	....	....	1862	79.96	..
28	....	....	1859	80	..
28	....	....	1865	20	..
32	....	....	1874	80	..
32	....	....	1885	40	..
32	....	....	1865	40	..
32	....	....	1871	119.75	..
32	....	....	1862	140.87	..
32	....	....	1869	40	..
32	....	....	1862	160	..
34	1900	1903	1908	160	..
34	1889	1896	1899	160	..
34	1882	1883	1891	160	..
34	1883	1885	1886	160	..

RECAPITULATION

Number of entries made prior to 1875 15
Number of entries made between 1875 and 1880..10
Number of entries made between 1880 and 1890..24
Number of entries made since 1890 38

Total entries 87

TOWNSHIP 26 SOUTH, RANGE 13 WEST.

LIST OF ENTRIES MADE

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
12	....	....	1874	120	..
12	....	....	1874	208.30	..
12	....	....	1873	159.12	..
12	....	....	1877	80	..
12	....	....	1872	80	..
14	....	....	1874	61.07	..
24	....	....	1891	40	..
24	....	....	1878	160	..
24	....	....	1879	42.80	..
24	....	....	1874	173.38	..
24	....	....	1875	160	..
26	....	....	1872	160	..
26	....	....	1872	160	..
26	....	....	1873	160	..
26	....	....	1872	189.27	..

Recapitulation

Number of entries made prior to 1875 10
Number of entries made between 1875 and 1880 . 4
Number of entries made between 1880 and 1890 . 0
Number of entries made since 1890 1

Total entries 15

TOWNSHIP 27 SOUTH, RANGE 13 WEST

List of Entries Made

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
2	....	....	1875	143.90	..
2	....	....	1872	102.46	..
2	....	....	1892	40	..
2	....	....	1877	190.05	..
2	....	....	1872	30.40	..
2	....	....	1883	40	..
2	....	....	1872	40	..
4	....	....	1872	151.14	..
4	....	....	1872	157.44	..
4	....	....	1872	160	..
4	....	....	1872	160	..
6	....	....	1871	644.50	..
8	....	....	1871	640	..
10	....	....	1872	80	..
10	....	....	1886	40	..
10	....	....	1872	160	..
10	....	....	1888	40	..
10	....	....	1872	160	..
10	....	....	1875	160	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
12	....	....	1875	160	..
12	....	....	1875	120	..
12	....	....	1872	40	..
12	....	....	1875	160	..
12	....	....	1875	160	..
14	....	....	1874	160	..
14	....	....	1873	160	..
14	....	....	1873	160	..
14	....	....	1873	160	..
16	....	....	1873	160	..
18	....	....	1871	160	..
22	....	....	1873	160	..
22	....	....	1873	160	..
22	....	....	1873	160	..
22	....	....	1873	160	..
24	....	....	1883	160	..
24	....	....	1873	160	..
24	....	....	1875	160	..
24	....	....	1883	160	..
26	....	....	1874	160	..
26	....	....	1883	160	..
26	....	....	1883	160	..
26	....	....	1883	160	..
28	1886	1887	....	...	320
28	1889	1889	....	...	160
28	1890	1894	....	...	160
34	....	....	1874	160	..
34	....	....	1876	120	..
34	....	....	1878	156.90	..

Section Number	Date of First Entry	Cancelled	Date of Present Entry	Number of Acres	Acres Still Vacant
34	....	....	1872	36	..
34	....	....	1875	4	..
34	....	....	1877	80	..
34	....	....	1887	80	..

Recapitulation

Number of entries made prior to 1875 29
Number of entries made between 1875 and 1880..12
Number of entries made between 1880 and 1890.. 9
Number of entries made since 1890 1

Total entries 51

SUMMARY BY TOWNSHIP AND RANGE

Number of Entries

Township	Range	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
28 South,	7 West	23	3	9	26
28 South,	8 West	10	3	5	52
29 South,	8 West	4	4	9	23
28 South,	9 West	..	..	..	65
29 South,	9 West	2	2	2	35
28 South,	10 West	..	3	4	47
29 South,	10 West	..	..	1	22
27 South,	11 West	..	3	17	28
28 South,	11 West	..	6	17	51
26 South,	12 West	14	20	26	25
27 South,	12 West	5	12	26	35
28 South,	12 West	15	10	24	38
26 South,	13 West	10	4	..	1
27 South,	13 West	29	12	9	1
		112	82	149	449

We follow this with a certified copy of the state records of school lands within the limits of the grant (Defendant's Exhibit 216). This list was duly certified by the clerk of the State Land Board and shows the disposition of all the school lands within the limits of the grant up to the time of beginning this suit. The list occupies thirteen pages of the printed Abstract, from page 303 to page 316, inclusive, and it is unnecessary to copy it here. We have tabulated it, however, so as to show the date of the entries, arranged on four periods:

First—Those applications which were made prior to 1875.

Second—Those applications which were made between 1875 and 1880.

Third—Those applications which were made between 1880 and 1890.

Fourth—All applications made since 1890.

And the result is as follows:

(And, first, we call the Court's attention to a mistake in the printed record: Township 26 South, Range 12 West, appearing first on page 303, is duplicated on page 311; Township 28 South, Range 8 West, appearing first on page 309, is duplicated on page 312. This was an error in arranging matter for the printer. Outside of this, the list beginning on page 303 and extending to page 315 of the printed Abstract is correct.)

Arranging these sections in a regular order, beginning in Range 6 West, the Roseburg end of the

Road, and running through Ranges 7, 8, 9, 10, 11, 12 and 13, the Coos Bay end of the Road, we get the following result:

SUMMARY BY TOWNSHIP AND RANGE OF SCHOOL SECTIONS

Number of Entries

Range	Township	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
6 West,	27 South.....	6	..	2	..
6 West,	28 South.....	3	2	1	..
7 West,	27 South.....	3	..	1	1
7 West,	28 South.....	5	2	3	..
7 West,	29 South.....	2	..	1	4
8 West,	27 South.....	2	..	..	4
8 West,	28 South.....	2	..	5	1
8 West,	29 South.....	1	1	1	6
9 West,	28 South.....	..	..	1	4
9 West,	29 South.....	2	..	8	..
10 West,	28 South.....	..	1	..	5
10 West,	29 South.....	..	..	5	..
11 West,	27 South.....	..	1	3	3
11 West,	28 South.....	..	1	9	3
12 West,	25 South.....	2	..	3	5
12 West,	26 South.....	2	1	3	5
12 West,	27 South.....	2	1	7	1
12 West,	28 South.....	..	4	8	2
13 West,	26 South.....	8	..	..	..
13 West,	27 South.....	7	..	..	..

GOVERNMENT IS ESTOPPED BY THE RECORD IN PRIOR SUITS

(Defendant's Exhibits 240, 241, 242, 243)

It is alleged in the Government's Bill as an excuse for bringing this suit at this late day that the Government never knew of the matters now set up as constituting breach of condition until 1907.

"By reason of the premises the aforesaid violations of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, 1869, were concealed from and wholly unknown to your orator until on or about the year A. D. 1907." (Page 30, printed Abstract.)

That this statement is entirely without foundation is conclusively shown by the record in these four suits:

EXHIBIT No. 240

(Pages 410 to 419, printed Abstract)

This is a certified copy of record of a case brought by the United States against Coos Bay Wagon Road Company and the Southern Oregon Company. The complaint, which was filed February 18, 1896, sets out the Act of March 3, 1869, the Act of Legislative Assembly October 22, 1870, Act of Congress June 18, 1874, and pleads that on the 19th of September, 1872, the Governor of the State of Oregon issued his certificate as to the completion and the acceptance of the road. The bill then recites that on the 12th day of February, 1875, a patent was issued to the Coos Bay Wagon Road Company

for the N.E. ¼ of the N.E. ¼, Section 9, T. 28 S., Range 7 W., and further that on the 22nd day of January, 1863, James L. Miller, a duly qualified homestead entryman, entered said N.E. ¼ of the N.E. ¼ of Section 9, T. 28 S., Range 7 W., and that said homestead entry remained uncancelled and was in full force and effect up to December 5, 1870, and that said land was not public land subject to grant on the 3rd day of March, 1869, or on the 22nd day of October, 1870, or at any time prior to December 5th, 1870. It is alleged that the defendant, the Southern Oregon Company, claims title to this property, "its claim of title being as follows, viz: a deed to it *through a chain of mesne conveyances* from the patentee." The prayer of the bill is that the patent be set aside "and that said *several mesne conveyances* from said Coos Bay Wagon Road Company to the Southern Oregon Company may also be set aside, cancelled and declared null and void." This bill was demurred to by the Southern Oregon Company on September 21, 1896. On January 12, 1897, the demurrer was sustained, and on June 21, 1897, the bill was dismissed. The Government at this time, from February 18, 1896, when it filed its bill, to June 21, 1897, when it submitted to a dismissal of the bill and refused to plead further, knew, because its pleading says it knew, that the Southern Oregon Company claimed title to this land by reason of the grant *and the various mesne conveyances connecting the Southern Oregon Company with the patentee. It knew, therefore, of the deed to Miller*

and of the various transactions alleged in the bill in this case to constitute a breach of condition subsequent.

EXHIBIT No. 241

(Pages 419 to 439, printed Abstract)

On February 29th, 1896, the complainant filed its bill of complaint against the Coos Bay Wagon Road Company, The Southern Oregon Company, T. R. Sheridan, J. P. Sheridan, R. S. Sheridan, Margaret Briggs, Helen M. Rook and Mary A. Rook. The bill of complaint in that case sets out the different Acts of Congress pleaded in the bill in this case and in the Exhibit 240. It then pleads that on the 15th of February, 1877, and on October 3rd, 1874, patents were issued to the Coos Bay Wagon Road Company for the following land:

TOWNSHIP 28 SOUTH, RANGE 8 WEST

	Section
S.E. ¼ of the N.W. ¼	1
Lots 1, 2, 3 and 4	3
S. ½ of N. ½, S. ½	3
Lots 1, 2, 3, 4, S. ½ of N. ½, S. ½	5
Lots 1, 2, 3, 4, E. ½ of W. ½ and E. ½	7
All	9
All	17
Lots 1, 2, 3, 4, E. ½ of W. ½, E. ½	19
All	21
All	29

Township 29 South, Range 9 West

	Section
N.E. ¼, N.W. ¼ and S.W. ¼	1
Lots 1, 2, 3, 4, S. ½ of N. ½, and S. ½	3
Lots 1, 2, 3, 4, S. ½ of N. ½, and S. ½	5
Lots 1, 2, 3, 4, E. ½ of W. ½, E. ½	7
All	9

Township 28 South, Range 9 West

	Section
Lots 1, 2, 3, 4, S. ½, S. ½ of N. ½	1
Lots 1, 2, 3, 4, S. ½, S. ½ of N. ½	3
Lots 1, 2, 3, 4, S. ½, S. ½ of N. ½	5
Lots 1, 2, 3, 4, E. ½ of W. ½, E. ½	7
All	9
All	11
All	13
All	15
All	17
Lots 1, 2, 3, 4, E. ½ of W. ½, E. ½	19
All	21
All	23
All	25
All	27
All	29
Lots 1, 2, 3, 4, E. ½ of W. ½, E. ½	31
All	33
All	35

Township 28 South, Range 8 West

	Section
W. ½ N. E. ¼, N.W. ¼ and S.E. ¼	11
E. ½ of N.E. ¼, S.W. ¼ of N. E. ¼, S.E. ¼ of N.W. ¼, S.E. ¼, S.W. ¼ of S.W. ¼, E. ½ of S.W. ¼	13
Lots 2, 3, N.W. ¼ of N.E. ¼, N. ½ of N.W. ¼, S.W. ¼ of N.W. ¼, E. ½ of S.W. ¼	15
Lot 4, S.E. ¼ of S.E. ¼, W. ½ S.E. ¼, S.W. ¼	23
N.W. ¼, N.W. ¼ of S.W. ¼	25
All	27
N. ½ of N.E. ¼, N.W. ¼, S.W. ¼, S. ½ S.E. ¼	31
N.E. ¼, N.W. ¼, N. ½ of S.W. ¼, S.E. ¼, S. ½ of S.W. ¼	33
W. ½ of N.W. ¼, N.E. ¼, E. ½ of N.W. ¼, N. ½ of S.E. ¼, N.E. ¼ of S.W. ¼	35

Township 29 South, Range 9 West

	Section
N.E. ¼, N.W. ¼, S.W. ¼	1
S. ½ of N.E. ¼, S.E. ¼, W. ½	11

Township 29 South, Range 8 West

	Section
Lots 1, 2, 3, 7, 8, 9, N. ½ of N.E. ¼, N.E. ¼ of N.W. ¼	1
N.E. ¼, N.W. ¼, S. ½	3
N.E. ¼, N.W. ¼, S. ½	5
N.E. ¼ of N.E. ¼, N.W. ¼	7
All	9
E. ½ of N.E. ¼, S.W. ¼ of N.E. ¼, N.W. ¼, S. ½	11
N. ½	15
Lot 3, N.E. ¼ of N.E. ¼	17

Township 29 South, Range 7 West

	Section
Lots 1, 2, 3, S.W. ¼ of N.E. ¼, S. ½ of N.W. ¼, N.W. ¼ of S.E. ¼, S.W. ¼	7

Township 28 South, Range 6 West

	Section
Frac. N.E. ¼ of N.E. ¼, Frac. N.W. ¼ N.E. ¼	3
Lot 10	7
N.W. ¼	9
S.E. ¼ of S.W. ¼, S. ½ of S.E. ¼	23

Township 28 South, Range 7 West

	Section
E. ½ of N.E. ¼, W. ½ of N.E. ¼, N.W. ¼, E. ½ of S.E. ¼, N.W. ¼ of S.W. ¼	5
N.W. ¼ of N.E. ¼, E. ½ of N.W. ¼, W. ½ of N.W. ¼, E. ½, S.W. ¼ of S.E. ¼, S.E. ¼ of S.W. ¼	7
N.E. ¼ of N.E. ¼, S.W. ¼ of N.E. ¼, N.W. ¼ of N.W. ¼, S.E. ¼ of S.E. ¼, W. ½ of S.E. ¼, S. ½ of S.W. ¼	9
S.W. ¼ of S.E. ¼	11
S. ½ of N.W. ¼, N. ½ of S.W. ¼, S.W. ¼ of S.W. ¼	13
Lots 1, 2, 3, 4, 5, 6, S.W. ¼ of S.E. ¼, S. ½ of S.W. ¼	15
S.W. ¼ of N.E. ¼, S.W. ¼	17
N.E. ¼, N.W. ¼, S.E. ¼, S.W. ¼	19
N.E. ¼, N.W. ¼, N. ½ of S.E. ¼, N.E. ¼ of S.W. ¼, W. ½ of S.W. ¼	21
Lots 1, 2, 3, 4, 5, 6, 7, 8, 10, W. ½ of N.E. ¼, and N.W. ¼	23

	Section
W. ½ of N.W. ¼	25
Lots 3 and 4	27
Lots 1, 5, 6, 7, 8, 9, 10, N. ½ of N.W. ¼	29
Lot 3	31
Lots 1 and 2	33
S.E. ¼, E. ½ of S. W. ¼	35

It is then pleaded that Congress passed an Act July 25, 1866 (the O. & C. Grant), and that the said grant, franchises, etc., were transferred to the Oregon & California Railroad Company, and that on March 26, 1870, the line or road of the O. & C. Co. was definitely fixed, and a plat filed, and that all of the lands described in the bill lie within the place limits of the grant of 1866, and therefore the title vested in the O. & C. Co., etc. It is alleged that the ministerial officers of the United States acted erroneously in issuing patents to the Coos Bay Wagon Road Company; and the various defendants, Sheridan, Briggs, Rook and Rook, purchased by *mesne conveyances* from the Coos Bay Wagon Road Company and took with notice. It is alleged in the bill that the Southern Oregon Company *"claims to be the owner in fee simple of all of the lands described herein, * * * its claim of title being as follows: A deed to it through a chain of mesne conveyances from the patentee, * * * ; that the said Southern Oregon Company claims said land in fee simple,"* but your orator insists that said Southern Oregon Company is chargeable with constructive notice of the several laws of the United States,

pleaded herein, and of the laws with regard to the lands of the United States and disposal thereof, *and that under the laws of Congress and by reason of the acts and doings of the said Coos Bay Wagon Road Company, no title could pass to said Southern Oregon Company,* and that "said patent should be cancelled to it as well as to the grantee therein, the Coos Bay Wagon Road Company." The prayer of the bill is "That the patent purporting to convey title to the said above-described lands may be set aside and declared null and void, and that said several *mesne* conveyances from said Coos Bay Wagon Road Company to the said defendants herein may be set aside, cancelled and declared null and void. To this bill the defendant Coos Bay Wagon Road Company and the Southern Oregon Company filed demurrers on May 25, 1896. On January 12, 1897, the demurrers were sustained, and on June 21, 1897, the suit was dismissed. No appeal was ever taken by the United States and the decree of the Court dismissed the bill for want of equity. *When this suit was brought and the decree dismissing the bill was entered the Government knew all it knows now as to the transfers from the Coos Bay Wagon Road Company to the Southern Oregon Company, and might have asked for a forefiture of the whole grant with as much reason as it asks for it now.*

EXHIBIT No. 242

(Pages 439 to 500, printed Abstract)

On February 29, 1896, the Government filed its bill in this Court against the Coos Bay Wagon Road Company, the Southern Oregon Company, Lorenz Vogl, John Vogl, Mathias Vogl, W. S. Hamilton, Mary Mark, Charlotte H. Elliott, Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake. In this bill the Government pleaded the various Acts of Congress and of the State of Oregon pleaded in the bill herein, also pleaded the acceptance by the Governor of the road September 19, 1872. It is then alleged, March 26, 1873, a patent was issued to the Coos Bay Wagon Road Company for certain lands described and on February 12, 1875, another patent was issued for certain other lands. That Samuel C. Braden was a duly qualified entryman under the laws of the United States and on the —— day of January, 1869 (prior to the grant), settled upon a quarter section, to wit: the N.W. ¼ of the S.W. ¼ of Section 25, Township 27 South, Range 12 West, and that he was a qualified homesteader, etc. It is also alleged that other lands to the amount of 1,099.50 acres described in the bill were patented to the Coos Bay Wagon Road Company by mistake and as a matter of fact lie entirely outside of the limits of the grant, and that the ministerial officers, etc., made a mistake in issuing the patents. It is also alleged that the defendant "the Southern Oregon Company, defendant herein, claims title to

the lands described herein (except the lands sold by it)." Its claim of title being as follows:

"A deed to it through a chain of mesne conveyances from the patentee."

The prayer of the bill is as follows:

"That the said Southern Oregon Company claims title to said lands in fee simple, but your orator insists that said Southern Oregon Company is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doing of said Coos Bay Wagon Road Company, no title could pass to said Southern Oregon Company and said patents should be cancelled as to it as well as to the grantee therein, the Coos Bay Wagon Road Company."

On May 25, 1896, a demurrer was filed by the Southern Oregon Company to this bill. On March 10, 1897, the Coos Bay Wagon Road Company answered the bill. In the answer the Coos Bay Wagon Road Company pleads the issuance of the patent to it for the lands described in the bill, and in fact pleads all the legislation set out in the complaint in this suit and the compliance by the Coos Bay Wagon Road Company with all the requirements of the grant. It then pleads as follows:

"That on January 7, 1884, this defendant, Coos Bay Wagon Road Company, by deed with covenants of general warranty of said date, conveyed said N.E. ¼ of N.W. ¼ of Section 7, Township 26, and N.W. ¼ of S.W. ¼ of Section 25, Township 27 South, of Range 12 West of the Willamette Meridian, and other lands, to W. H. Besse, for the consideration of $91,715.05 paid to it, which deed was duly filed by said Besse for record and recorded March 19, 1884, on page 110 of Book 13 of the Records of Deeds of Coos County, Oregon, where said premises and other lands are situated." (P. 468, Printed Abstract.)

It is then alleged that the other lands were conveyed in like manner to the different grantees. On March 10, 1897, the Southern Oregon Company filed its answer setting up the same matters, and then says:

"That this defendant claims the title and possession of said premises, as alleged in the bill of complaint, under said Coos Bay Wagon Road Company, through the following chain of *mesne* conveyances:

"(1) Deed with covenants of general warranty from said Coos Bay Wagon Road Company to W. H. Besse for said N.E. ¼ of N.W. ¼ of Section 7, Township 26, and N.W. ¼ of S.W. ¼ of Section 25, Township 27 South, of Range 12 West of the Willamette Meridian, and other lands, reciting a consideration paid of $91,715.05, date January 7, 1884, and recorded March 19, 1884, on page 119 of Book 13 of the Records of Deeds of Coos County, Oregon.

"(2) Deed with covenants of general warranty from said W. H. Besse and —— Besse, his wife, to the Oregon Southern Improvement Company, a corporation, for said premises and other lands, reciting a consideration of $91,715.05 paid, dated June 4, 1884, and recorded September 8, 1885, on page 236 of Book 14 of the Records of Deeds of said Coos County, Oregon.

"(3) Deed of bargain and sale from George H. Durham, Mastery in Chancery under decree of foreclosure and sale of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Co. in suit No. 1344, to W. W. Crapo and W. J. Rotch, for said premises and other lands, reciting a consideration of $120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on page 175 of Book 16 of the Records of Deeds of said Coos County, Oregon.

"(4) Deed of bargain and sale from said W. W. Crapo and —— Crapo, his wife, and W. J. Rotch and —— Rotch, his wife, to Southern Oregon Company, this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213 of Book 16 of the Records of Deeds of said Coos County, Oregon.

"(5) Deed of bargain and sale from said Coos Bay Wagon Road Company to Mary M. Noah for said S.W. ¼ of N.W. ¼ and N.W. ¼ of S.W. ¼ of Section 7, Township 26 South, of Range 12 West

of the Willamette Meridian, and other lands, reciting a consideration of $200 paid, dated May 19, 1873, and recorded May 19, 1873, on page 570 of Book 2 of the Records of Deeds of said Coos County, Oregon.

"(6) Deed of bargain and sale from said Mary M. Noah and John Noah, her husband, to David M. Turner for said premises and other lands, reciting a consideration of $180 paid, dated January 25, 1874, and recorded January 25, 1874, on page 326 of Book 3 of the Records of Deeds of Coos County, Oregon.

"(7) Deed of quit claim from said David N. Turner and Emma Turner, his wife, to B. S. Stickney, for said premises and other lands, reciting a consideration of $250 paid, dated September 15, 1875, and recorded September 15, 1875, on page 519 of Book 5 of the Records of Deeds of said Coos County, Oregon.

"(8) Deed with covenants of general warranty from said B. S. Stickney to Cortes Corning for said premises and other lands, reciting a consideration of $300 paid, dated October 13, 1875, and recorded October 14, 1875, on page 546 of Book 5 of the Records of Deeds of said Coos County, Oregon.

"(9) Deed of bargain and sale from said Cortes Corning and Charlotte Corning, his wife, to said B. S. Stickney for said premises and other lands, reciting a consideration of $300 paid, dated February 7, 1876, and recorded July 12, 1883, on page 124 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(10) Deed of bargain and sale from said B. S. Stickney to J. A. Yoakam for said premises, reciting

a consideration of $400 paid, dated November 11, 1880, and recorded February 17, 1881, on page 239 of Book 9 of the Records of Deeds of said Coos County, Oergon.

"(11) Deed of bargain and sale from said J. A. Yoakam and —— Yoakam, his wife, to H. H. Luce, for said premises, reciting a consideration of $400 paid, dated January 3, 1881, and recorded February 17, 1881, on page 240 of Book 9 of the Records of Deeds of said Coos County, Oregon.

"(12) Deed with covenants of general warranty from said H. H. Luce and —— Luce, his wife, to J. N. Knowles, for said premises and other lands, reciting a consideration of $100,000 paid, dated June 20, 1883, and recorded July 23, 1883, on page 140 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(13) Deed with covenants of general warranty from said J. N. Knowles and —— Knowles, his wife, to the Oregon Southern Improvement Company, a corporation, for said premises and other lands, reciting a consideration of $10 paid, dated November 22, 1883, and recorded January 16, 1884, on page 556 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(14) Deed of bargain and sale from George H. Durham, Master in Chancery, under decree of foreclosure and sale of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Co. in suit 1344, to W. W. Crapo and W. J. Rotch,

for said premises and other lands, reciting a consideration of $120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on page 175 of Book 16 of the Records of Deeds of said Coos County, Oregon.

"(15) Deed of bargain and sale from W. W. Crapo and —— Crapo, his wife, and W. J. Rotch and —— Rotch, his wife, to Southern Oregon Co., this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213 of Book 16 of the Records of Deeds of said Coos County, Oregon.

"(16) Deed of bargain and sale from said Coos Bay Wagon Road Company to John Miller for said S.E. ¼ of S.E. ¼ of Section 19; N. ½ of N.E. ¼, S.E. ¼ of N.W. ¼ and S.W. ¼ of N.E. ¼ of Section 29, Township 25; S.W. ¼ of N.W. ¼, N.W. ¼ of S.W. ¼ of Section 5; and N.W. ¼ of N.E. ¼ of Section 7, Township 26 South, of Range 12 West; and W. ½ of S.E. ¼ of Section 1, Township 26 South, of Range 13 West of the Willamette Meridian, and other lands, reciting a consideration of $35,534 paid, dated May 31, 1875, and recorded June 15, 1875, on pages 320-328 of Book 5 of the Records of Deeds of Coos County, Oregon.

"(17) Deed of bargain and sale from said John Miller to Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins, for said premises and other lands, reciting a consideration of $35,000 paid, dated June 22, 1875, and recorded July

3, 1875, on page 359 of Book 7 of the Records of Deeds of said Coos County, Oregon.

"(18) Deed of bargain and sale from said Collis P. Huntington and Elizabeth Huntington, his wife, Leland Stanford and Jane Lathrop Stanford, his wife, and Mary Francis Sherwood Hopkins, widow and sole heir of said Mark Hopkins, deceased, to said Charles Crocker, for said premises and other lands, reciting a consideration of one dollar paid, dated March 27, 1882, and recorded May 2, 1882, on pages 621-631 of Book 9 of the Records of Deeds of said Coos County, Oregon.

"(19) Deed of bargain and sale from said Charles Crocker and Mary A. Crocker, his wife, to W. H. Besse, for said premises and other lands, reciting a consideration of $1.75 per acre paid, dated March 20, 1883, and recorded January 24, 1884, on page 585 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(20) Deed of quit claim from said W. H. Besse and —— Besse, his wife, to Russel Gray, for said premises and other lands, reciting a consideration of ten dollars paid, dated December 29, 1883, and recorded January 31, 1884, on page 602 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(21) Deed of quit claim from said Russel Gray to the Oregon Southern Improvement Company (a corporation) for said premises and other lands, reciting a consideration of ten dollars paid, dated January 5, 1884, and recorded January 31, 1884,

on page 611 of Book 12 of the Records of Deeds of said Coos County, Oregon.

"(22) Deed of bargain and sale from Geo. H. Durham, Master in Chancery, under decree of foreclosure and sale out of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Company, in suit No. 1344, to W. W. Crapo and W. J. Rotch, for said premises and other lands, reciting a consideration of $120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on page 175 of Book 16 of the Records of Deeds of said Coos County, Oregon.

"(23) Deed of bargain and sale from said W. W. Crapo and —— Crapo, his wife and W. J. Rotch and —— Rotch, his wife, to Southern Oregon Company, this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213 of Book 16 of the Records of Deeds of said Coos County, Oregon."

The answer then proceeds:

"And this defendant further says that to the best of its knowledge, information and belief, said Military Wagon Road from the navigable waters of Coos Bay to Roseburg, Oregon, was laid out and constructed by said Coos Bay Wagon Road Company through the N.W. ¼ of Section 33, the N.E. ¼ of Section 32, the S.W. ¼ of Section 29, and the S. ½ of Section 30, Township 26 South, Range 12 West

of the Willamette Meridian, and that no part of said premises is more than six miles distant from the line of said road; and that such has been the general understanding and belief of all persons living in the vicinity of said premises and road, ever since its completion in 1872, until the present time; and both said list approved by the Secretary of the Interior and issued to said Coos Bay Wagon Road Company for said premises and other lands, as inuring to the State of Oregon under said grant, on March 26, 1873, and patent issued therefor on February 12, 1875, recorded as aforesaid, recite that said premises lie respectively within the three and six-mile limits of said grant; and both said list and patent, and each and all of said deeds constituting the chain of *mesne* conveyances from said Coos Bay Wagon Road Company, patentee, to this defendant aforesaid, were in due form and regularly executed and recorded on the dates respectively aforesaid, and purported to convey a perfect and indefeasible title to said premises; and the consideration recited in each of said deeds respectively, as aforesaid, was actually paid in money at the time of the execution thereof; and at or before the respective times of payment of said consideration and the delivery and execution of said deeds respectively and the recording thereof aforesaid, said W. H. Besse; Oregon Southern Improvement Company; Mary M. Noah; David N. Turner; B. S. Stickney; Cortes Corning; J. A. Yoakam; H. H. Luce; J. N. Knowles; John Miller; Collis P. Huntington, Charles Crocker,

Leland Stanford, and Mark Hopkins; Russel Gray, W. W. Crapo, and W. J. Rotch; and the Southern Oregon Company, this defendant, respectively, had no notice whatsoever that said premises or any portion thereof lay without the limits of said grant, or that the ministerial, or any, officers of the United States had acted erroneously or contrary to the law in approving or issuing said list of patent, or any patent, therefor to said Coos Bay Wagon Road Company, under the facts stated in the bill of complaint, or otherwise, or of any Act of Congress, or law relating to the disposal of the public land of the United States, or act or doing of said Coos Bay Wagon Road Company, or any other matter or thing whatever, preventing the title to said premises from passing to them or any of them under said deeds respectively in fee simple or in any manner impairing or affecting the title thereto under said respective deeds, or any of them, but respectively purchased said premises at the dates of the respective deeds to them aforesaid, and respectively paid the considerations recited therein in money at the time of the execution and delivery thereof to them, on their respective dates aforesaid, and accepted and recorded the same on the respective dates aforesaid, relying upon and induced by said list and patent and said recital therein, and not otherwise, and they and each of them were, and this defendant is, purchasers of said premises in good faith and for a valuable and adequate consideration; and this defendant has ever since receiving and recording said deed for said

premises from W. W. Crapo and W. J. Rotch and wives, as aforesaid, held the title and possession thereof, and exercised full dominion over the same as absolute owner, in good faith and without any notice of any claim on the part of the United States thereto until the commencement of this suit, and is the owner in fee simple absolute thereof, and justly and legally entitled to the same."

To this answer of the Coos Bay Wagon Road Company the Government filed a replication on the 21st day of May, 1897. For some unexplainable reason the Coos Bay Wagon Road Company filed what is called a "demurrer" to this replication on the 5th day of June, 1897. This "demurrer" was sustained by the Court, and the order sustaining the demurrer goes on to say: "And thereupon, on motion of said plaintiff, it is ordered that said plaintiff be, and it is hereby allowed ten days from this date in which to further plead herein." On the 25th of June, the plaintiff not having filed any additional pleading, the Court entered the following order: "Now, at this day comes the plaintiff herein, by Mr. Charles J. Schnabel, Assistant United States Attorney, and the defendants herein by Mr. B. B. Beekman, of counsel, and thereupon it appearing to the Court that the demurrers of said defendants to the replication herein has been sustained by the Court, on motion of said defendants, it is ordered, adjudged and decreed that said bill of complaint herein be, and the same is hereby dismissed."

This record is curious, of course, and probably without a parallel. But while the procedure of demurring to a replication was never heard of before, yet the answer of the Coos Bay Wagon Road Company sets up in detail the history of this grant and the complete chain of title down to the Southern Oregon Company, and the Government was put upon notice then, if not before, of all the transfers pleaded by the defendant in this present suit.

EXHIBIT No. 243.

(Pages 500-529, printed Abstract.)

On the 25th day of August, 1897, the United States filed its bill of complaint against the Coos Bay Wagon Road Company. In this bill all of the legislation and the acts of the Government, etc., pleaded in the former bills and in the Government's bill in the present case, were pleaded. The bill then proceeds to state that on the 26th day of March, 1873, there was certified to the Coos Bay Wagon Road Company the N.W.¼ of S.W.¼ Section 25, Township 27 South, Range 12 West of the Willamette Meridian, and that at said time Samuel C. Braden was a duly qualified homestead entryman on said 40 acres, having settled on the same on the 7th day of January, 1869. It is further alleged that on the 26th of March, 1873, the United States patented to the Coos Bay Wagon Road Company the following lands:

"The S.E.¼ of the S.E.¼ of Section 19; the N.½ of the N.E.¼, the N.½ of the N.W.¼, the S.E.¼ of

the N.W.¼, and the S.W.¼ of the N.E.¼ of Section 29, and the W.½ of the N.W.¼ of Section 33, all in Township 25 South, Range 12 West of the Willamette Meridian; and the W.½ of the N.W.¼ and the N.W.¼ of the S.W.¼ of Section 5, and the N.W.¼ and the N.E.¼ and the N.½ of the N.W.¼, the S.W.¼ of the N.W.¼ and the N.W.¼ of the S.W.¼ of Section 7, all in Township 26 South, of Range 12 West of the Willamette Meridian."

It is further alleged in the bill that on the 12th of February, 1875, there was patented to the Coos Bay Wagon Road Company the following lands: N.W.¼, W.½ of the N.E.¼, N.W.¼ of S.W.¼, Lot 1 of Section 13, and the W.½ of the S.E.¼, S.E.¼ of the S.E.¼ of Section 1, all in Township 26 South of Range 13 West.

It is then alleged that Samuel C. Braden was a duly qualified homestead entryman in January, 1869, on the N.W.¼ of the S.W.¼ of Section 25, Township 27 South, Range 12 West, etc.

It is then alleged that the following lands lie outside the limit of the grant: The S.E.¼ of the S.E.¼, in Section 19, Township 25 South, Range 12 West, 40 acres; the North ½ of the N.E.¼, the North ½ of the N.W.¼, S.E.¼ of the N.W.¼ and S.W.¼ of the N.E.¼, in Section 29, Township 25 South, Range 12 West, 240 acres; the West ½ of the N.W.¼ of Section 33, Township 25 South, Range 12 West, 80 acres; the West ½, N.W.¼ and N.W.¼ of S.W.¼,

Section 5, Township 26 South, Range 12 West, 113.31 acres; the N.W.¼ of N.E.¼, the N.½ of N.W.¼, S.W.¼ of N.W.¼ and N.W.¼ of S.W.¼, Section 7, Township 26 South, Range 12 West, 196.70 acres; the N.W.¼, the W.½ N.E.¼, N.W.¼ S.W.¼ and Lot 1, Section 13, Township 26 South, Range 13 West, 309.58 acres; the W.½ S.E.¼ and S.E.¼ S.E.¼ Section 1, Township 26 South, Range 13 West, 130 acres, containing in all 1099.59 acres.

Defendant's Exhibits Nos. 242 and 243 covered the same lands. The suit, Exhibit No. 242, was dismissed June 25, 1897. The suit, Exhibit No. 243, was begun August 25, 1897, but does not refer in any way to the former suit. It is a bill of discovery. At the foot of the bill certain inquiries were propounded, as follows:

"1st. Whether any of the lands described herein have been sold.

"2nd. What are the particulars of such sales if sales were had?

"3rd. How were the lands sold? For cash or on deferred payments? To whom were the lands sold? When were they sold and for what consideration?

"4th. Were the lands, if sold, sold with or without covenants of warranty?

"5th. If any of the lands were sold on deferred payments, state the particulars of contracts of such sales; what has been paid thereon, how much is still due, and when is the same payable.

"*And your orator prays for a construction of the*

grant and a decree defining the rights of the parties in view of the grant and the proceedings thereunder.

"And your orator prays also that the moneys received by the defendant for any of the lands described herein sold, be declared to be the moneys and property of the United States, and a decree that they are held in trust by defendant for the complainant, and that such money, to the extent of $2.50 per acre for the lands erroneously taken, be paid to defendant, and that the lands not taken by the complainant be declared, etc."

Answering these interrogatories, the defendant Coos Bay Wagon Road Company said (page 520, printed Abstract):

"And, to the second interrogation propounded therein, answers and says: *That said lands were sold with other lands derived by it from said grant, amounting altogether to 87,405.18, at the price of $1.00 per acre;*

"And to the third interrogation propounded therein answers and says: Said lands were sold for cash to John Miller, May 31, 1875, and for the consideration of $1.00 per acre and in the aggregate $1139.59."

The defendant pleaded the record in suit, Exhibit No. 242 in bar. The defendant further pleaded in answer to the claim for an accounting that the money received from the lands upon sale to Miller, $1139.59, was distributed to its stockholders in good faith. Issues being joined, the case was heard and

decree entered. The decree cancelled the patent to the N.W.¼ of the S.W.¼ of Section 25, Township 27 South, Range 12 West, and further decreed as follows:

"It is further ordered and decreed that said complainant recover of and from said defendant the sum of $1099.59, said sum being the value of 1099.59 acres of land described in plaintiff's bill of complaint, which lie outside of the limits of the grant of lands to the defendant described in plaintiff's bill of complaint."

The record (Exhibit No. 242) shows a bill by the Government praying for the cancellation of the patents executed to the Coos Bay Wagon Road Company for the lands described in the bill. Discovery was not sought nor needed. The Coos Bay Wagon Road Company and the Southern Oregon Company answered the bill, setting out completely the chain of title relied upon in the answer in this case. Issue was joined, therefore, by the filing of the Government's replication; and while the procedure of sustaining a demurrer to a replication cannot be understood or explained, the fact remains that the Government's bill was dismissed, rightfully or wrongfully, and the Government submitted to the decision of the Court. This order of dismissal was entered June 25, 1897. On August 25, 1897, just two months afterwards, with this record before it, the Government brought another suit, this time against the Coos Bay Wagon Road Company alone, in which

the allegations are practically the same as in the suit Exhibit No. 242, but instead of applying to have the patents cancelled the Government asked for "discovery" as to what disposition the Coos Bay Wagon Road Company made of the land, and prays, *not for a decree cancelling the patent,* but,

"And your orator prays also, that the moneys received by the defendant for any of the lands described herein sold, be declared to be the moneys and property of the United States, and for a decree that they are held in trust by defendant for the complainant, and that such money, to the extent of $2.50 per acre for the lands erroneously taken, be paid to complainant, and that the lands *not sold by defendant be declared lands of the United States, and the patents thereto be decreed to be null and void.*"

PRETENDED APPLICATIONS TO PURCHASE WERE ALL SHAM.

It is pretended by the Government that there were some several hundred applications to purchase these lands from the Southern Oregon Company and the applications were refused. A reference to the testimony will show the nature of these applications. In the latter part of 1903 and up to March, 1904, a movement was started by E. B. Seabrook and C. T. McKnight, attorneys, to compel the Southern Oregon Company to sell its timber land at $2.50 per acre to whomsoever might apply therefor. At first they did not intend to include many, but when the word got out that applicants need not advance any

money at all—only pretend to have it—and that by simply asking they could get quarter sections worth from three to six thousand dollars for four hundred dollars, they came from everywhere to take advantage of the "find."

As Mr. McKnight says (page 334, printed Abstract):

"Q. Was there much interest shown by the people, much desire to get this land?

A. Well, there seemed to be more of a brainstorm than anything else. The office was simply crowded, that's all."

McKnight's testimony, from page 337 to page 342, gives a complete history of this transaction, showing how these applications were manufactured and for what purpose, and the utter sham of it all. On page 337, printed Abstract, he said:

"Q. But had you people gone out and selected the particular quarter sections you wanted?

A. No, except the map itself.

Q. You knew nothing about the relative values of it?

A. We knew what the cruise was and the description from the map was all, never been on the land itself."

It appears that these people McKnight and Seabrook had the form of application printed, there were so many that came, and that everyone paid $15.00. On page 338 McKnight says:

"Q. And did you refuse anybody?

A. No, there was nobody refused, but it was explained to all of them exactly what we were trying to do, that is all.

Q. Each one paid how much?

A. $15.00."

On page 340, Printed Abstract, he says:

"Q. You knew when you presented all these two or three hundred applications they would not be received?

A. I was satisfied they would be rejected.

Q. That is the reason you didn't go through the form of lugging up $400 in gold every time?

A. Yes, sir.

Q. You knew they would not take it?

A. Certainly I knew they would not take it. *Anybody would know that* that knew the conditions."

Mr. Geo. Watkins, who had charge of the matter of presenting the applications to purchase from the Southern Oregon Company, gives a very clear explanation on pages 322, 323, 324 and 325 of the Testimony. He says that he had a cruise in the timber that was obtained from M. J. Kinney, or a copy was made of Kinney's cruise, and that this cruise was consulted in locating applicants. That in response to information conveyed to the public, generally when applicants came in without having previously picked out a quarter section themselves, Watkins would pick them out a good quarter sec-

tion from the cruise he had, neither he nor the applicants knowing anything about the land except what the cruise showed. As to this he says (pages 325-326, printed Abstract):

"A. *So far as I was concerned, everyone was told that it was a chance, that it was a gamble.*

Q. *Taking a long shot at it?*

A. *Yes, we told them it was a gamble, or I did, those that I talked with, and if they wanted to take the chance and pay $21.00, very well, and if they didn't they would better let it alone.*

Q. But what I mean is, that if they could get the quarter section that you suggested to them for $400 and get a complete title to it, it would be a very good bargain, wouldn't it?

A. Indeed it would, most of it.

Q. And then they paid you the $21.00 for your expense and for making these applications and taking care of it for them. Now, Mr. Watkins, did they each one bring $400 to you?

A. No, sir.

Q. That is a fact, they didn't do that?

A. No, sir.

Q. You knew when you made the applications that they were going to be refused after you got started on it?

A. Yes, sir.

Q. So that that was a formality. They probably would be ready to give it if you asked them for it, but none of them did as a matter of fact leave the money with you?

A. No, sir.

Q. When you went to make the application did you then tender $400 in money to Mr. Shine?

A. Yes, sir.

Q. *One $400 would do for the whole bunch?*

A. *One $400 answered for the whole bunch.*"

Surely no argument will be needed to show that these applications were not in good faith.

EXHIBIT No. 190.

(Pages 316-317, printed Abstract.)

Exhibit 190 contains the certificates of the Governor of the State of Oregon as to the completion and acceptance of the road. These various papers show the completion and acceptance of the road, in its entirety, prior to September 19, 1872.

It is impossible, of course, in a brief of the facts to include *all the facts,* but we have endeavored in the foregoing skeleton to present to the Court the framework of the defendant's case. No attempt was made by the Government to show bad faith on the part of this defendant or any of the holders of this title through whom defendant claims. The Government's oral testimony was directed to showing that the road was not properly constructed and that the terms of the grant were known by the first settlers. These are immaterial matters and the testimony in regard to them should be struck out.

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Southern Oregon Company.

No. 2772 2

United States
Circuit Court of Appeals
For the Ninth Circuit.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, a Corporation, and GEORGE D. PARKER,

Appellants,

vs.

FRED STEBLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellants:

NICHOLAS A. ACKER, Esq., Foxcroft Building, 68 Post St., San Francisco, California.

For Appellee:

FREDERICK S. LYON, Esq., Merchants Trust Building, Los Angeles, California.

[4*]

[Citation on Appeal.]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Fred Stebler, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, wherein Riverside Heights Orange Growers' Association and George D. Parker, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern

*Page-number appearing at foot of page of original certified Record.

District of California, Southern Division, this 28th day of December, A. D. 1915.

OSCAR A. TRIPPET,
United States District Judge. [5]

[Endorsed]: In Equity. C. C. No. 1562. United States District Court for the Southern District of California, Southern Division. Riverside Heights Orange Growers' Association and George D. Parker, Appellants, vs. Fred Stebler, Appellee. Citation on Appeal. Filed Dec. 28, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER, and PARKER MACHINE WORKS,

Defendants. [6]

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER and PARKER MACHINE WORKS,

Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division:

Fred Stebler, a citizen of the State of California and resident of Riverside, California, brings this his Bill of Complaint against Riverside Heights Orange Growers' Association, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California, George D. Parker, a resident of Riverside, California, and Parker Machine Works, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California, and thereupon, complaining, showes unto your Honors: [7]

I.

That heretofore, to wit, prior to the 28th day of

April, 1902, one Robert Strain, of Fullerton, California, was the original, first and sole inventor of a certain new and useful FRUIT GRADER, not known or used by others before his invention or discovery thereof; or patented or described in any prior publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon in the United States of America, as hereinafter set forth, or in public use or on sale in the United States for more than two years prior to his said application for letters patent of the United States therefor, and not abandoned.

II.

That said Robert Strain so being the original, first and sole inventor of said fruit grader, to wit, on the 28th day of April, 1902, made application in writing, in due form of law, to the Commissioner of Patents of the United States of America, in accordance with the then existing laws of the United States of America in such case made and provided, and complied in all respects with the conditions and requirements of said law, and thereafter, and prior to the 9th day of June, 1903, by an instrument in writing, in due form of law, duly signed by said Robert Strain, and by him delivered to your orator, Fred Stebler and Austin A. Gamble, of Riverside, California, the said Robert Strain did sell, assign, transfer and set over unto your said orator and the said Austin A. Gamble, the full and exclusive right, title and interest in and to the said invention and in and to the letters patent to be granted and issued there-

for, [8] and did authorize and request the Commissioner of Patents to issue said letters patent jointly to your orator and the said Austin A. Gamble; that said instrument in writing was, to wit, prior to June 9th, 1903, duly and regularly recorded in the United States Patent Office; that thereafter such proceedings were duly and regularly had and taken in the matter of such application that, to wit, on June 9th, 1903, letters patent of the United States of America, No. 730,412, were duly and regularly granted and issued and delivered by the Government of the United States of America to your orator and the said Austin A. Gamble, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17), from and after said 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention through the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents, all as will more fully appear from said original letters patent or a duly certified copy thereof which are ready in court to be produced by your orator, as may be required; and that prior to the grant, issuance and deliverance of the said letters patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

III.

And your orator further shows unto your Honors that on October 12th, 1903, the said Robert Strain and your orator and [9] the said Austin A. Gamble discovered for the first time that the said letters patent were inoperative and insufficient, and that the errors which rendered said letters patent No. 730,412 so inoperative and insufficient arose from the inadvertence, accident and mistake of the Commissioner of Patents of the United States and without any fraudulent intention on the part of the said Robert Strain, or upon the part of your orator, or upon the part of said Austin A. Gamble; that said inadvertence, accident and mistake upon the part of the said Commissioner of Patents of the United States consisted in this, that after the said Robert Strain had duly filed in the United States Patent Office his application for letters patent upon the said fruit grader, as aforesaid, one Charles Rayburn, did on August 18th, 1902, file in the United States Patent Office an application for letters patent upon said new and useful fruit grader and in said application did make certain claims as the original, true and first inventor thereof; that through the inadvertence, accident and mistake of the Commissioner of Patents a patent was issued to the said Charles Rayburn therefor, said letters patent being numbered 726,756, and were granted, issued and delivered to the said Charles Rayburn on April 28th, 1903, and while the said Robert Strain's application for letters patent was pending in the United States Patent Office, as aforesaid, and the Commissioner of Patents did by

inadvertence, accident and mistake fail and neglect to give notice to the said Robert Strain, or your orator, or said Austin A. Gamble, of said Charles Rayburn's application for letters patent upon said fruit grader, and did fail and neglect to declare an interference proceeding between said Robert Strain and Charles Rayburn or the application of said Robert Strain and Charles Rayburn for letters patent upon [10] said fruit grader, and did fail and neglect to determine whether the said Robert Strain or the said Charles Rayburn was the original, first and sole inventor of said fruit grader, and did fail and neglect to determine the question of priority of invention between said Robert Strain and said Charles Rayburn; that said Robert Strain and your orator and the said Austin A. Gamble first discovered this inadvertence, accident and mistake upon the part of the Commissioner of Patents on October 12th, 1903, and did forthwith immediately direct their attorneys to prepare an application for a reissue patent upon said Robert Strain's said invention in fruit grader; that said Robert Strain did make due application in writing, in due form of law, for a reissue of said letters patent, which said application was filed in the United States Patent Office on October 21st, 1903, by the said Robert Strain with the full consent and allowance of your orator and the said Austin A. Gamble, and that thereafter due proceedings were had in the United States Patent Office in accordance with the Statutes in such cases made and provided, and in accordance with the rules of the United States Patent Office, and that said Robert

Strain was adjudged to be the original, first and sole inventor of said fruit grader, and judgment of priority of invention was rendered and entered in the United States Patent Office in favor of Robert Strain and against said Charles Rayburn; and thereafter, to wit, on December 27th, 1904, the said Robert Strain and your orator and the said Austin A. Gamble having in all respects complied with the Acts of Congress in such case made and provided, and having surrendered the said orginal letters patent No. 730,412, said letters patent were cancelled and new or amended Letters Patent which were marked "Reissue No. 12,297" were on the 27th day of December, 1904, in due form of law, granted, issued, and delivered to your orator [11] and the said Austin A. Gamble, which said reissue letters patent are of record in the Patent Office of the United States, as will more fully and at large appear from said original reissued letters patent or a duly certified copy thereof ready here in court to be produced, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17) from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending the said invention as described and claimed in said reissued letters patent throughout the United States of America and the territories thereof.

IV.

And your orator further shows unto your Honors that the said invention so set forth, described and

claimed in and by the said letters patent aforesaid is of great value and has been extensively practiced by your orator and by your orator and the said Austin A. Gamble, and that since the grant, issuance and delivery of the said letters patent the said fruit grader has gone into great and extensive use and your orator and said Austin A. Gamble have sold large numbers thereof and the same has substantially displaced all other forms of devices for said purpose and become the standard fruit grader; and upon each and every one of said fruit graders manufactured, used or sold by your orator or by your orator and said Austin A. Gamble, as aforesaid, your orator, and your orator and the said Austin A. Gamble have marked in bold and conspicuous letters the word "Patented," together with the day and date of issuance of said letters patent, to wit, June 9th, 1903, and December 27th, 1904, thereby notifying the public of said letters patent, and the trade and public have generally [12] respected and acquiesced in the validity and scope of said letters patent and of the exclusive rights of your orator, and of your orator and said Austin A. Gamble therein and thereunder, and save and except for the infringement thereof by defendants as hereinafter set forth your orator, and your orator's assignors, have had and enjoyed the exclusive right, liberty and privilege, since December 27th, 1904, of manufacturing, selling and using fruit graders embodying and containing the invention described in, set forth and claimed in said letters patent, and but for the wrongful and infringing acts of defendants, as hereinafter set forth,

your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator, and the said defendants have been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of the said letters patent and of the rights of your orator thereunder, and have had full knowledge of your orator's said rights under said letters patent, and demand has been made upon defendants to respect the said letters patent and not to infringe thereon, but notwithstanding such notice the defendants have continued to make, use and sell fruit graders embodying the said invention, as hereinafter more particularly set forth.

V.

Your orator further shows unto your Honors that heretofore, to wit, prior to the first day of January, 1910, by an instrument in writing in due form of law, duly signed by the said Austin A. Gamble, and delivered by him to your orator, the said Austin A. Gamble did sell, assign, transfer and set over unto your orator, his heirs and assigns, all his right, title and interest in and to the said fruit grader invention and in and to the said letters patent aforesaid granted and issued therefor, and did thereby sell, [13] assign, transfer and set over unto your orator, and vest in your orator, and *you* orator did become the sole and exclusive owner of the full and exclusive right, title and interest in and to the said fruit grader invention and in and to the said letters patent granted and issued therefor, all as will more fully and at

large appear from said original instrument in writing or a duly certified copy thereof ready in court to be produced as may be required.

VI.

And your orator further shows unto your Honors that notwithstanding the premises, but well knowing the same, and without the license or consent of your orator, and in violation of said letters patent, and of your orator's rights thereunder, the said defendants herein have within the year last past and in the Southern District of California, to wit, in the county of Riverside, State of California, and elsewhere, made, used and sold to others to be used, and are now making, using and selling to others to be used fruit graders embodying, containing and embracing the invention described and claimed and patented in and by said reissued letters patent, and have infringed upon the exclusive rights secured to your orator by virtue of said reissued letters patent, and that the fruit graders so made, used and sold by defendants were and are infringements upon said letters patent and each of said fruit graders contains in it the said patented invention, and that although requested so to do defendants refuse to cease and desist from the infringement aforesaid and are now making, using and selling fruit graders containing and embracing the said patented invention and threaten and intend to continue so to do, and will continue so to do unless restrained by this [14] Court, and are realizing, as your orator is informed and believes, large gains, profits and advantages, the exact amount of which is unknown to your orator; that by reason of the prem-

ises and the unlawful acts of the defendants aforesaid, your orator has suffered and is suffering great and irreparable damage and injury; that for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy at law and is without remedy save in a court of equity where matters of this kind are properly cognizable and relievable.

To the end therefore that the said defendants, Riverside Heights Orange Growers' Association, George D. Parker and Parker Machine Works, may, if they can, show why your orator should not have the relief herein prayed, and may according to the best and utmost of their knowledge, recollection, information and belief, but not under oath, (an answer under oath being hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore charged; your orator prays that the defendants may be enjoined and restrained, both provisionally and perpetually, from further infringement upon the said letters patent, and be decreed to account for and pay over unto your orator the gains and profits realized by defendants from and by reason of the infringement aforesaid, and may be decreed to account for and pay over unto your orator the damages suffered by your orator by reason of the said infringement, together with the costs of this suit, and for such other and further or different relief as equity and good conscience shall require.

May it please your Honors to grant unto your orator a writ of injunction issued out of and under

the seal of this Court, provisionally, and until the final hearing, enjoining and restraining said defendants, Riverside Heights Orange Growers' [15] Association, George D. Parker and Parker Machine Works, their agents, attorneys, associates, servants, and employees, and each and every thereof, from making, using and selling any fruit graders containing or embracing the invention patented in and by said letters patent, and that upon the final hearing of this case said provisional injunction may be made final and perpetual.

May it please your Honors to grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Court and directed to the said defendants, Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, commanding them by a day certain and under a certain penalty fixed by law, to be and appear before this Honorable Court, then and there to answer this Bill of Complaint and to stand to and perform and abide by such further orders and decrees as to your Honors may seem meet in the premses.

And your orator will ever pray.

FRED STEBLER.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant,
503–8 Merchants Trust Company Building,
Los Angeles, California.

United States of America,
State of California,
County of Riverside,—ss.

Fred Stebler, being duly sworn, on oath, says, that he is the complainant named in the foregoing Bill of Complaint, that he has read said Bill of Complaint and knows the contents thereof [16] and that the same is true of his own knowledge.

FRED STEBLER.

Subscribed and sworn to before me this 23d day of May, 1910.

[Seal] WM. STUDABECKER,
Notary Public in and for Riverside County, State of California.

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, George D. Parker and Parker Machine Works, Defendants. In Equity. Bill of Complaint. Filed May 24, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [17]

In the United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER, and PARKER MACHINE WORKS,

Defendants.

Answer.

The answer of the Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, defendants, to the Bill of Complaint of Fred Stebler, complainant.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is, or are, material or necessary for them to make answer unto, these defendants for *answering saith;*

1. Admit that the Riverside Heights Orange Growers' Association, one of the defendants herein, is a corporation [18] organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in

Riverside, California, and admits that George D. Parker, another of the defendants herein, is a resident of Riverside, California.

2. Deny that the Parker Machine Works, one of the defendants herein, is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California.

3. They deny that the said Robert Strain, mentioned in the Bill of Complaint, prior to the 28th day of April, 1902, or at any other time, or at all, was either the original first and sole inventor of the alleged certain new and useful fruit grader, alleged in the Bill of Complaint to be more particularly described in the alleged letters patent alleged to have been ishsued therefore by the Government of the United States; and they deny that the said improvements, or any of them, were a new or useful invention, or were not known or used by others in this country before the alleged invention or discovery thereof by the said Robert Strain, and deny that the same were not patented or described in any prior publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon, in the United States of America, or that the same was not in public use or on sale in the United States for more than two years prior to his said application for letters patent of the United States therefor, or that the same was not abandoned.

4. These defendants, further answering, say that

as to whether or not the said Robert Strain, being as aforesaid the alleged original and first inventor of the said alleged improvement [19] in fruit graders, or otherwise, did on the 28th day of April, 1902, or at any other time, duly or regularly make or file in the Patent Office of the United States, an application in writing, praying for the issuance to him of letters patent of the United States for the said alleged invention, these defendants are not informed save by the Bill of Complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he may be advised is material.

5. These defendants further answering, say that as to whether or not after the filing of the said alleged application in the United States Patent Office, and before the granting of letters patent thereon, or at any other time, the said Robert Strain, by an instrument in writing, in due form of law, or otherwise, duly signed by him, and by him delivered to Fred Stebler, complainant herein, and Austin A. Gamble, of Riverside, California, and duly recorded in the United States Patent Office, or otherwise, the said Robert Strain did sell, assign, transfer and set over unto the said Fred Stebler and the said Austin A. Gamble, *and* full and *excluse* right, title and interest in and to the said invention, or any right, title and interest in and to the same, and in and to the letters patent to be granted and issued therefor, with the request that the letters patent therefor, when granted, should be issued jointly to the said Fred Stebler and the said Austin A. Gamble, they are not

informed save by the Bill of Complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material. These defendants deny that thereafter, or at any time, such proceedings were duly and regularly taken in the matter of the said alleged application, that, on the 9th day of June, 1903, or at any other time, [20] letters patent of the United States of America, No. 730,412, were duly and regularly granted and issued and delivered by the Government of the United States of America to the said Fred Stebler and the said Austin A. Gamble, or either of them, and deny that the said Fred Stebler and the said Austin A. Gamble, or either of them, or their heirs, legal representatives and assigns, or either of them, were granted for the full term of seventeen years (17) from and after the 9th day of June, 1903, or for any other term, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said alleged invention throughout the United States of America and the territories thereof.

6. These defendants further answering, deny that the said alleged letters patent were issued in due form of law, or otherwise, under the seal of the United States Patent Office, or otherwise, or were duly signed by the Commissioner of Patents; and deny that said facts will more fully appear from said alleged patent themselves.

7. These defendants further answering, deny that prior to the issuance of said alleged letters patent, all proceedings were had or taken which were required

to be had and taken prior to the issuance of letters patent for new and useful inventions.

8. These defendants further answering, say that whether the said alleged letters patent No. 730,412, referred to in the Bill of Complaint as having been issued as therein stated, for an improved fruit grader, were inoperative and insufficient, and whether the error by reason of which the same were rendered inoperative and insufficient arose by inadvertence, accident and mistake on the part of the Commissioner of Patents of the United [21] States and without any fraudulent intention on the part of the said Robert Strain, or upon the part of Fred Stebler, complainant herein, or upon the part of the said Austain A. Gamble, they are not informed save by the Bill of Complaint herein, and they, therefore, deny the same, and leave complainant to make such proof thereof as he shall be advised is material.

9. These defendants further answering say that whether the alleged inadvertence, accident and mistake upon the part of the Commissioner of Patents of the United States was occasioned by the fact that after the said Robert Strain had filed in the United States Patent Office his alleged application for letters patent upon said fruit grader, one Charles Rayburn, did on August 18th, 1902, file in the United States Patent Office an application for letters patent upon said new and useful fruit grader and in said application did make certain claims as the original, true and first inventor thereof, and that through the inadvertence, accident and mistake of the Commissioner of Patents a patent was issued to said Charles

Rayburn therefore, said letters patent being numbered 726,756, which were granted, issued and delivered to the said Charles Rayburn on April 28th, 1903, and while the said Robert Strain's application for letters patent was pending in the United States Patent Office, and the Commissioner of Patents did by inadvertence, accident and mistake fail and neglect to give notice to the said Robert Strain, or to Fred Stebler, complainant herein, or to said Austin A. Gamble, of said Charles Rayburn's application for letters patent upon said fruit grader, and did fail and neglect to declare an interference proceeding between said Robert Strain and Charles Rayburn or the applications of said Robert Strain and Charles Rayburn for letters patent upon [22] said fruit grader, and did fail and neglect to determine whether the said Robert Strain or the said Charles Rayburn was the original, first and sole inventor of said fruit grader, and did fail and neglect to determine the question of priority of invention between said Robert Strain and Charles Rayburn, they are not informed save by the Bill of Complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material.

10. These defendants further answering say that whether the said Robert Strain, and Fred Stebler, complainant herein, and the said Austin A. Gamble first discovered the alleged inadvertence, accident and mistake upon the part of the Commissioner of Patents on October 12th, 1903, and did forthwith and immediately direct their attorneys to prepare an appli-

cation for a reissue patent upon said Robert Strain's said invention in fruit graders, or whether the said Robert Strain did make due application in writing, in due form of law, or otherwise, for a reissue of the letters patent mentioned in the bill of complaint, or whether said alleged application was filed in the United States Patent Office on October 21st, 1903, by the said Robert Strain with the full consent and allowance of Fred Stebler, complainant herein, and the said Austin A. Gamble, or whether thereafter due proceedings were had in the United States Patent Office in accordance with the Statute in such cases made and provided, and in accordance with the rules of the United States Patent Office, or whether the said Robert Strain was adjudged to be the original, first and sole inventor of said fruit grader and judgment of priority of invention was rendered and entered in the United States Patent Office in favor of said Robert Strain and against said Austin A. Gamble, they are not informed save by the Bill of Complaint herein, and they, therefore, deny the same, all and [23] singular, and leave complainant to make such proof thereof as he shall be advised is material.

11. These defendants further answering say that whether the said Robert Strain and Fred Stebler, complainant herein, and Austin A. Gamble having in all respects complied with the Acts of Congress in such cases made and provided, and having surrendered the said original letters patent No. 730,412, said letters patent were cancelled and new or amended letters patent which were marked "Reissue No. 12,297" were on the 27th day of December, 1904,

in due form of law, granted, issued and delivered to Fred Stebler, complainant herein, and the said Austin A. Gamble, which said reissue letters patent are of record in the Patent Office of the United States, they are not informed save by the Bill of Complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material; and deny that said facts will more fully and at large appear from said original reissue letters patent or a duly certified copy thereof.

12. These defendants deny that the said reissue letters patent No. 12,297 were effective to grant and secure to the said Fred Stebler, complainant herein, and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17) or for any term, either from and after after the 9th day of June, 1903, or from any other date the sole and exclusive right, liberty and privilege of making, using and vending the said invention as described and claimed in said reissue letters patent throughout the United States of America and the territories thereof.

13. These defendants aver that they are not informed as to whether or not the invention alleged to be contained in the [24] said reissue letters patent No. 12,297 is the same invention as that set forth in the original letters patent No. 730,412, set forth in the Bill of Complaint herein, and they, therefore, deny the same and leave the complainant to make such proof thereof as he shall be advised is material.

14. Further answering, these defendant deny that the alleged invention alleged to be protected by the said alleged reissue letters patent is of great or any value, and deny that since the issuance of the said alleged reissue letters patent, or at any time, the fruit graders mentioned therein have gone into great and extensive use, or have been extensively practiced, or otherwise, and deny that large numbers thereof have been sold, and deny that upon each and every one of said fruit graders manufactured, used or sold by the complainant herein, or by the said complainant and Austin A. Gamble, or by either of them, made in accordance with the said reissue letters patent, has been marked with the word "Patented" together with the date and number thereof, and deny that the public was thereby notified of the same, and deny that the trade and public have generally respected and acquiesced in the validity and scope of said letters patent and the *excluse* right, or any right of the complainant herein, and of the complainant and said Austin A. Gamble, and deny that save and except for the alleged infringement thereof by these defendants, the complainant herein and the complainant and the said Aust*a*in A. Gamble, would have had and enjoyed the exclusive right, liberty and privilege, since December 27th, 1904, or any other time, of manufacturing, selling or using fruit graders embodying and containing the invention described in, set forth and claimed in said letters patent, and deny that but for the alleged wrongful and infringing acts of these defendants, complainant [25] herein would now continue to enjoy the said exclusive rights,

or any rights, at all, and that the same would be of great and *incalculate* benefit and advantage, or any benefit and advantage, to the complainant, and deny that they have been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of the said letters patent and of the rights of the complainant thereunder, and deny that they have had full knowledge of complainant's said rights under said letters patent and that demand has been made upon them to respect the said letters patent and not to infringe thereon, and deny that notwithstanding such alleged notice they have continued to make, use, and sell fruit graders embodying the said alleged invention.

15. Defendants further answering say that whether prior to the first day of January, 1910, or at any other time, by an instrument in writing in due Austin A. Gamble, and delivered by him to the complainant herein, the said Austin A. Gamble did sell, assign, and transfer and set over unto the complainant herein, his heirs, and assigns, all his right, title, and interest in and to the said fruit grader invention and in and to the said letters patent granted and issued therefor, and did thereby sell, assign and transfer and set over unto and did vest in the complainant herein, and complainant did become the sole and exclusive owner of the full and exclusive right, title and interest in and to the said alleged fruit grader invention and in and to the said alleged letters patent granted and issued therefor, they are not informed save by said bill of complaint herein, and

they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he may be advised is material, and they deny that said facts will more fully appear from said original instrument in writing or a duly certified copy thereof. [26]

16. These defendants deny that since the issuance of said alleged letters patent, and within the year last past, or at any time, or within the Southern District of California, or at any other place, the defendants herein have made, used and sold to others to be used, and are now making, using and selling to others to be used fruit graders embodying, containing, and embracing the invention described and claimed and patented in and by said reissue letters patent, and deny that they have infringed or are now infringing, or threaten to continue to infringe upon the alleged exclusive rights alleged to be secured to complainant by virtue of said alleged letters patent, and deny that any fruit grader made, used or sold, or sold to others for use, at any time, were or are an infringement upon said alleged letters patent, or contain or embody the said alleged invention.

17. Further answering defendants deny that complainant has requested these defendants to cease or desist from their alleged infringement aforesaid, and deny that they are now making or selling or using fruit graders containing or embracing the alleged invention or any of them, alleged to be patented in and by said alleged letters patent, and deny that unless restrained by the order of this Honorable Court they will at any time make or sell or use fruit graders

alleged to be described and claimed in said alleged letters patent.

18. These defendants deny that by reason of the premises set up in said Bill of Complaint, or by reason of any unlawful act of the defendants, complainant, has suffered any injury or damage, and deny that they have realized large gains, profits and advantages from and by reason of any alleged infringement of complainant's rights.

19. These defendants further answering, aver that said alleged improvements or inventions described and claimed in the [27] said original letters patent mentioned in the Bill of Complaint, and mentioned in the reissue letters patent thereof, did not and do not constitute any invention or discovery that was or is patentable under the laws of the United States.

20. Defendants further answering aver that in view of the prior state of the art pertaining to fruit graders and the manner of their construction and operation, there was and is no patentable invention contained and embraced in the said alleged improvements described and claimed in the said alleged reissue letters patent sued on herein; but that the same or substantially the same things were well known in the art prior to the alleged invention thereof by the said Robert Strain; and if in the alleged improvements there is anything new or different from what was known or discovered in said prior art, it was not the result of patentable invention, but wholly the result of the ordinary skill of the mechanic, and is of no practical utility.

And for a further and separate defence, these defendants aver that the alleged invention described and claimed in the said alleged reissue letters patent sued on herein, or substantially the same was, long prior to the supposed invention or discovery thereof by the said Robert Strain, indicated, described and patented in and by the following letters patent of the United States, to wit:—

Number.	Date.	Names of Patentees.
No. 247,428	Sept. 20, 1881,	H. B. Stevens
" 348,128	Aug. 24, 1886,	J. W. Keeney
" 352,421	Nov. 9, 1886,	J. S. McKenzie
" 399,509	Mar. 12, 1889,	F. N. Ellithorpe
" 430,031	June 10, 1890,	J. A. Jones
" 442,288	Dec. 9, 1890,	J. A. Jones
[28]		
" 456,092	July 14, 1891,	H. H. Hutchins
" 458,422	Aug. 25, 1891,	J. T. Ish
" 465,856	Dec. 29, 1891,	H. H. Hutchins
" 466,817	Jan. 12, 1892,	E. E. Woodward
" 475,497	May 24, 1892,	G. A. & C. F. Fleming
" 482,294	Sept. 6, 1892,	A. C. Burke
" 529,032	Nov. 13, 1894,	H. C. Jones
" 534,783	Feb. 26, 1895,	A. Cerruti
" 538,330	Apr. 30, 1895,	A. D. Huntley
" 654,281	July 24, 1900,	M. P. Richards
" 671,646	Apr. 9, 1901,	R. G. Bailey
" 673,127	Apr. 30, 1901,	E. N. Maull
" 713,484	Nov. 11, 1902,	C. D. Nelson
" 726,756	Apr. 28, 1903,	C. Rayburn

21. Further answering, defendants aver that said Robert Strain was not the original or first or any inventor or discoverer of the alleged improvements and inventions, or any of them, alleged to be de-

scribed in said alleged letters patent in suit, or of any material or substantial part of the same, but that, on the contrary, prior to the alleged invention thereof by the said Robert Strain, Charles Rayburn, who resides at Visalia, in the county of Tulare, State of California, had conceived and invented each and all of said alleged improvements and inventions, and said Charles Rayburn is the original and first inventor and discoverer of said alleged improvements and inventions, and of each of them.

22. And for a further and separate defence, these defendants aver that the said Robert Strain was not the original and first inventor or discoverer of the improvements or inventions alleged [29] to be described and covered by the said alleged reissue letters patent, nor of any material or substantial parts thereof, but that the same or all material or substantial parts thereof were, prior to the alleged invention thereof by the said Robert Strain, and more than two years prior to his alleged application for letters patent thereon, manufactured and sold in this country, and these defendants specify such manufacture and sale as follows, to wit:

Manufactured and sold by G. G. Wickson, of the city and county of San Francisco, State of California.

23. And for a further and separate defence, these defendants aver that the said alleged improvements and inventions, and each and all of them, had been prior to the alleged invention thereof by the said Robert Strain, and more than two years prior to his alleged application for letters patent thereon, known to and used by the following named persons,

firms, and corporations, at the following places to wit:

Uplands Citrus Association, in its plant at Upland, California; also by the W. H. Jameson Packing Packing House, in its plant at Corona, California; The Arlington Heights Fruit Company, in its plant at Arlington, California; Victoria Avenue Citrus Association, in its plant at Casa Blanca, California; San Jacinto Packing House Company in its plant at Arlington, California; *Pacentia* Orange Growers' Association, in its plant at Fullerton, California; Santiago Orange Growers' Association, in its plant at Orange, California; Indian Hill Citrus Association, in its plant at North Pomona, California, Worthley & Strong, in their plant at Riverside, California; and was known to Charles S. Adams, whose residence is Upland, California; W. H. Jameson, whose residence is Corona, California; Charles Spencer, Edward Gilman, and Ernest Parker, each of Orange, California, and was known to and used by [30] others whose names and places of residences, and the places of such use are at this time unknown to the defendants, but which these defendants crave leave to insert herein and make a part hereof when they shall be discovered.

24. Further answerings, these defendants aver that the public at no time has acquiesced in the validity of the said alleged letters patent in suit, and that the validity of said letters patent has not been adjudicated or established in an action at law; that, therefore, this Court sitting as a court in equity has no jurisdiction of this case, and complainant's relief

in the premises, if to any relief he is entitled, can only be obtained in an action at law.

And, therefore, these defendants submit and insist that under the facts and circumstances as above alleged, the said complainant is not entitled to the relief or any part thereof in the said bill of complaint demanded, nor has said complainant any right to any further answer to said bill nor any part thereof than is above given.

And these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said bill of complaint, and they pray leave to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION,
PARKER MACHINE WORKS,
GEORGE D. PARKER,

By N. A. ACKER and
WM. F. BOOTH,
Solicitors and Attorneys for Defendants.

N. A. ACKER and
WM. F. BOOTH,
Solicitors and of Counsel for Defendants.

[31]

[Endorsed]: No. 1562. In the United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, Defendants. Answer. Filed Jul. 26, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. N. A. Acker,

Wm. F. Booth, #68 Post St., San Francisco, Cal., Solicitors and Counsel for Defendants. [32]

In the District Court of the United States for the Southern District of California, Second Division.

IN EQUITY—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER AND PARKER MACHINE WORKS,

Defendants.

Final Decree.

At a stated term, to wit, the July term, A. D. 1912, of the above-entitled court held at the courtroom thereof in the City of Los Angeles, county of Los Angeles, State of California, on the 17th day of September, 1912.

Present—Honorable OLIN WELLBORN, District Judge.

This cause having heretofore come on regularly to be heard upon the pleading and proofs, documentary and oral, taken and submitted in the case and being of record herein, the complainant being represented by Frederick S. Lyon, Esq., and the defendants by N. A. Acker, Esq., and the cause having been submitted to the Court, for its consideration and decision, and the Court being fully advised in the premises, and it appearing to the Court that

claims 1 and 10 of United States reissue letters patent No. 12,297 (the only claims involved herein) granted Robert Strain—December 27, 1904, for an improvement in fruit graders, as construed by the Court are good and valid in law, and it further appearing to the [33] Court that the defendants have not infringed the said claims—1 and 10 of the reissue letters patent sued upon herein as construed by the Court.

It is ordered, adjudged and decreed that complainant's Bill of Complaint be, and the same is hereby dismissed, and further that the defendants do have and recover from complainant the sum of $383.40, being defendant's proper and necessary costs and disbursements herein.

OLIN WELLBORN,
District Judge.

Decree entered and recorded September 30th, 1912.

WM. W. VAN DYKE,
Clerk,
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn. Geo. D. Parker and Parker Machine Works, Defendants. Final Decree. Filed September 30, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., Defendants. [34]

[Mandate of U. S. Circuit Court of Appeals in Stebler vs. Riverside Heights Orange Growers' Association et al., No. 2232.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States of the Southern District of California, Southern Division, Greeting:

(Seal)

Whereas, lately in the District Court of the United States for the Southern District of California, Southern Division, before you, or some of you, in a cause between Fred Stebler, Complainant and Riverside Heights Orange Growers' Association, George *R.* Parker and Parker Machine Works, Defendants, No. 1,562, a Final Decree was duly entered in the 30th day of September, A. D. 1912, dismissing the complainant's Bill of Complaint, etc.; which said final decree is of record in the said cause in the office of the clerk of the said District Court, (to which record reference is hereby made and the same is hereby expressly made a part hereof,) as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Fred Stebler as appellant against Riverside Heights Orange Growers' Association, a corporation, and George D. Parker as appellees agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 7th day of March in the year

of our Lord one thousand nine hundred and thirteen the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District [35] Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellees, and that this cause be, and hereby is remanded to the said District Court with instructions to grant the relief prayed for.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellees for his costs herein expended, and have execution therefor. (June 12, 1913.)

You, therefore, are hereby commanded that such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court and as according to right and justice and the laws of the United States ought to be had, the said decree of said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 4th day of November, in the year *of Lord* one thousand, nine hundred and thirteen.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the appellant and against the appellees as per annexed

bill of items, taxed in detail: $1,317.83.

F. D. MONCKTON,
Clerk. **[36]**

BILL OF ITEMS ANNEXED TO MANDATE PURSUANT TO SECTION 5, RULE 31.

Debit Item No.	Debit Items.	Dr.	Cr.
1	Docketing Cause and Filing Record.	5.00	
2	Entering 2 Appearance.....	.50	
3	Entering Continuance		
4	Entering 2 Order.....	.40	
5	Filing 14 Papers	3.50	
6	Filing Briefs for Each Party Appearing (2)	10.00	
7	Filing Reply Brief Appellant.....	5.00	
8	Filing.....		
9	Filing Argument.....		
10			
11	Transferring Cause on Printed Calendar (1).....	1.00	
12	Drawing, Filing and Recording Decree or Judgment.....	1.65	
13			
14	Filing Petition for a Rehearing.....		
15			
16	Issuing Certified Copy Order.....	1.40	
17	" " Bond.....	3.40	
18	" " Record.....	14.00	

19	Issuing Mandate, $5.00; Costs and Copy, $0.40	5.40
20		
21	Total Miscellaneous Costs	51.25
22	Expense, Printing Record	791.75
23		
24	Total of Debit Items	843.00

[37]

Credit Item No.	Credit Items.	
1	Deposited Account Misc. Costs Appellant	36.30
2	Deposited Account Misc. Costs Appellee	14.00
3		
4		
5	Expense, Printing Record Appellant	791.75
6		
7	Total of Credit Items	842.05
8	Balance	.95
	Totals	843.00 843.00

Item No.	Itemized Bill of Costs Allowed and Taxed.	Amount.
1	Certified Cost of Transcript from Court Below	371.50

2	Cost of Patents used in said Transcript	1.05
3	Deposit Account Misc. Costs.....	31.50
4	Total Expense, Printing Record.....	791.75
5	Cost of Patents used in Printed Record.	36.75
6	Express charges Re Exhibits, cartage, etc.....	64.33
7	Attorney's Docket Fee.....	20.00
8	Balance costs.....	.95

Total (Inserted in Body of Mandate)
Taxed at.....$1,317.83

Attest: F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. **[38]**

[Endorsed]: No. 2232. United States Circuit Court of Appeals for the Ninth Circuit. Fred Stebler vs. Riverside Heights Orange Growers' Association, a Corporation, et al. Mandate.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler vs. Riverside Heights Orange Growers' Association et al. Mandate. Filed Nov. 6, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[39]**

[Notice of Presenting of Mandate of Circuit Court of Appeals, etc.]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. NO. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

To Defendants Above Named and N. A. Acker, Wm. M. Hiatt and H. L. Carnahan, Their Solicitors and Counsel:

Please take notice that on Wednesday, November 7th, 1913, at the opening of said court on said day, to wit, 10:30 A. M., or as soon thereafter as counsel can be heard, complainant will present to said Court the Mandate of the Circuit Court of Appeals for the Ninth Circuit in the above-entitled suit, and move the signing and enrollment of a decree in accordance with such Mandate, a copy of the proposed decree being herewith served upon you.

FREDERICK S. LYON,
Solicitor for Complainant.

Received a copy of the foregoing notice and a copy of the said proposed decree this 6th day of November, 1913.

WILLIAM M. HIATT,
Solicitor and of Counsel for Defendants. **[40]**

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. NO. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

Interlocutory Decree.

Pursuant to the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit, it is hereby ORDERED, ADJUDGED AND DECREED:

First. That the decree herein signed, filed and entered on September 17, 1912, dismissing complainant's Bill of Complaint, be and the same is hereby vacated, set aside, canceled and rescinded and judgment in favor of defendants and against complainant for the sum of $383.40 is vacated, set aside, canceled and rescinded.

Second. That Robert Strain was the original, first and sole inventor of the fruit grader set forth, described and claimed in reissued letters patent of the United States No. 12,297, and particularly as set forth in claims one (1) and ten (10) thereof which are as follows:

Claim 1. "In a fruit grader, in combination a plurality of independent transversely adjustable rotating rollers; a nonmovable grooved guide lying

parallel with the place which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit runway; a rope in the groove in said guide and means to move said rope."

Claim 10. "In a fruit-grading machine, a runway formed of two parallel members, one of said members consisting of a **[41]** series of end-to-end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth."

That the same had not been known or used by others before said Robert Strain's invention or discovery thereof or patented or described in any printed publication in the United States of America or any foreign country before said Robert Strain's invention or discovery thereof or more than two years prior to said Robert Strain's original application for letters patent thereon, or in public use or on sale in the United States of America for more than two years prior to said Robert Strain's said application for letters patent thereon, and not abandoned; that said Robert Strain made application in writing in due form of law to the Commissioner of Patents of the United States in accordance with the laws of the United States of America in such case made and provided for letters patent thereon and complied in all respects with the conditions and requirements of such law, and thereafter by an instrument in writing signed by him duly sold, assigned and transferred to complainant Fred Stebler and one Austin A.

Gamble the full and exclusive right, title and interest in and to said invention and in and to the letters patent to be granted and issued therefor; that letters patent of the United States No. 730,412 were on June 9, 1903, granted, issued and delivered by the Government of the United States to said Fred Stebler and Austin A. Gamble whereby there was granted and secured to them, their heirs, legal representatives and assigns for the full term of seventeen years from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention throughout the United States of America and the territories thereof; that said letters patent were issued in due form of law under the seal of the United States Patent Office and **[42]** duly signed by the Commissioner of Patents; that the said letters patent No. 730,412 were inoperative and insufficient by reasons of certain errors and insufficiencies and that the said errors which rendered said letters patent so inoperative and inefficient arose from the inadvertence, accident and mistake of the Commissioner of Patents of the United States and without any fraudulent intention on the part of said Robert Strain or Fred Stebler or Austin A. Gamble; that promptly and diligently upon the discovery of such errors by said Robert Strain, Fred Stebler and Austin A. Gamble said Robert Strain with the consent and allowance of said Fred Stebler and Austin A. Gamble made application for reissued or amended letters patent for said invention, and after due pro-

ceedings had in the United States Patent Office in due accord with the law in such case made and provided on December 27, 1904, reissued or amended letters patent No. 12,297 were on the 27th day of December, 1904, in due form of law granted, issued and delivered to the said Fred Stebler and Austin A. Gamble whereby there was granted and secured to the said Fred Stebler and Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention throughout the United States of America and the territories thereof, as described and claimed in said reissued letters patent.

Third. That said reissued letters patent Number 12,297 are good and valid in law, and that said claims one (1) and ten (10) thereof are good and valid in law.

Fourth. That by an instrument in writing, executed by him and delivered to complainant, said Austin A. Gamble sold, assigned and transferred to complainant all said Austin A. Gamble's right, **[43]** title and interest in, to and under said letters patent and invention and complainant Fred Stebler became and at the commencement of this suit was and now is the sole owner of the full and exclusive right, title and interest in, to and under said letters patent and invention together with all rights of action, claims or demands of whatsoever nature arising out of or accruing from past infringement thereof.

Fifth. That said Fred Stebler and Austin A. Gamble, while owning said letters patent jointly and said Fred Stebler, since said assignment to him by said Austin A. Gamble, have manufactured and sold numbers of fruit graders or sizers embodying said invention and that upon each and every thereof have distinctly and plainly marked in bold and conspicuous letters the word "Patented," together with the words and figures "June 9, 1903, and December 27, 1904," that prior to the commencement of this suit defendants Riverside Heights Orange Growers' Association and George D. Parker were each notified in writing by complainant of the said reissued letters patent number 12,297 and of complainant's ownership thereof and that the fruit graders or sizers said defendants were making and using were infringements thereof and were requested to respect said letters patent and discontinue the making, use or sale of such infringing machines.

Sixth. That the defendants Riverside Heights Orange Growers' Association and George D. Parker have infringed the said reissued letters patent number 12,297 and particularly the said first and tenth claims thereof and the exclusive rights of complainant thereunder by making, using and selling the so-called "Parker" grader and by making, using and selling graders, built in substantial accordance with letters patent of the United States number 997,468 granted to defendant Parker, without the license or consent of complainant, and have continued so to do since the commencement of this suit and

threaten and intend to continue so to do. **[44]**

Seventh. That complainant recover of the defendant, and each of them, the profits, gains and advantages which said defendants, and each of them, have or has derived, received or made, by reason of said infringement, and that complainant recover of the said defendants, and each of them, any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendants, or either of them.

Eighth. And it is hereby referred to Lynn Helm, Esq., as the Master of this Court, who is appointed, *pro hac vice,* to take and state the account of said gains, profits and advantages and to assess such damages and to report thereon with all convenient speed, and the said Riverside Heights Orange Growers' Association and George D. Parker, their attorneys, officers, clerks, servants, agents, associates and workmen, are hereby directed and required to attend before said Master from time to time as he may require, and to produce before him such books, papers, vouchers, documents, records or other things and to submit to such oral examination as the Master may require.

Ninth. That a perpetual injunction issue out of and under the seal of this Court, directed to said defendants, Riverside Heights Orange Growers' Association and George D. Parker, their and each of their, officers, attorneys, agents, servants, workmen, clerks and associates enjoining and restraining them and each of them from directly or indirectly making or causing to be made, using or causing to be used, sell-

ing or causing to be sold, in any manner, any machine or device or fruit grader or sizer, containing or embodying or employing the said invention granted by the said reissue letters patent, or particularly as set forth and claimed in claims numbered one (1) and ten (10) thereof, or any device or machine capable of being combined or adapted to be used in infringement of said letters patent or said claims thereof in any manner whatsoever; and from making [45] or causing to be made, using or causing to be used or selling or otherwise disposing of for use any machine made in substantial accordance with letters patent of the United States number 997,468 granted to defendant George D. Parker, and from continuing the manufacture, sale or use in any manner whatsoever of the so-called "Parker" grader or graders.

Tenth. That complainant do have and recover judgment against defendants Riverside Heights Orange Growers' Association and George D. Parker, jointly and severally, for the sum of $1,576.63 costs and disbursements of this suit, and that the further questions of increase of damages be reserved until the coming in of the Master's Report.

Dated Los Angeles, California, Nov. 7th, 1913.

OLIN WELLBORN,
District Judge.

Decree entered and recorded November 7th, 1913.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

$382.60, being all of the items on the first page of items and $2.00 on the second page of items in cost bill omitted by mistake on original taxation of costs and now inserted and included in the taxed costs, making the total of costs taxed $1,959.23, Dec. 16, 1913.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Cir. Ct. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, and George D. Parker, Defendants. In Equity. Interlocutory Decree. Filed Nov. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. **[46]**

In the United States District Court, Southern District of California, Southern Division.

FRED STEBLER,
Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION et al.,
Defendants.

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[Proceedings Had July 29, 1914, 9:30 A. M.]

In the United States District Court, Southern District of California, Southern Division.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION et al.,

Defendants.

Proceedings had before Hon. LYNN HELM, Special Master, under the interlocutory decree in the above-entitled suit, commencing at the hour of 9:30 A. M. of Wednesday, July 29, 1914.

Present: FREDERICK S. LYON, Esq., Solicitor for Complainant.

N. A. ACKER, Esq., Solicitor for Defendants.

The following proceedings were had:

[Statement of George D. Parker.]

The defendant George D. Parker presents a statement under oath in response to the order of the Master, which statement is filed.

Henry D. French as president and manager of defendant Riverside Heights Orange Growers' Association presents a statement on behalf of said de-

fendant Riverside Heights Orange Growers' Association, which is filed.

Complainant thereupon takes exception to the statement filed on behalf of said Riverside Heights Orange Growers' Association, as follows:

That it does not appear therefrom that the said statement embraces or covers all of the infringing sizers purchased or used [49] by said defendant Riverside Heights Orange Growers' Association to the date of the Master's order herein, and that said statement is not accurate or exact as to the number of such sizers so purchased or used by said defendant association; that such statement does not in any manner set forth any profits derived by the said defendant association from the use of the infringing sizers or graders referred to in said statement or report, and in this respect it does not comply with the requirements of the interlocutory decree in this case, or the order of the Master herein.

To the statement filed by the defendant Parker, complainant excepts as follows:

1. That said statement does not contain a true statement of the number of graders manufactured or sold by the defendant Parker in infringement of letters patent in suit.

2. That said statement is not prepared in accordance with the order of the Master herein or the equity rules.

3. That it is impossible to ascertain from the said report the period of time covered by said report, and exception to such report is taken as not correctly setting forth either the sale price of the

infringing grader, the contracts therefor as a whole, or the cost of manufacture thereof, as required by the Master's order herein.

4. Exception is taken to the alleged items of overhead expenses as not allowable herein, and on the further ground that it is impossible to ascertain from said statement that the alleged overhead expenses are chargeable either in whole or in part to the manufacture and sale of the infringing graders.

5. The complainant excepts to each and every item and statement in said report of said Parker as incorrect, insufficient and inadequate, and requests an opportunity to examine [50] the defendant Parker and his books and records fully with reference thereto.

Mr. ACKER.—Counsel for the defendant requests that complainant's counsel specify wherein he desires a fuller statement than that which has been filed and specified, and more particularly such additional matter as he desires to be supplied by the defendant Parker in order to enable him to more fully understand and pass on the report as submitted.

To that exception noted as to the statement supplied not being in accordance with the equity rules and the rules of this Court, and to the further exception that the statement does not disclose all of the machines manufactured or sold by the defendant Parker, counsel for defendants asks for a ruling of the Court thereon. A ruling of the Court is also asked relative to the exception taken to the report supplied by the Riverside Heights Orange Growers'

Association as to the inaccuracy of the report in not specifying all the machines supplied to said company by the defendant George D. Parker, and also a ruling of the Court is requested as to the alleged failure of the defendant Riverside Heights Orange Growers' Association to report as to the profits derived from the use of the machines therein reported.

(Thereupon an adjournment is taken until 2 o'clock P. M. of this day at this same place.) [51]

[Proceedings Had July 29, 1914, 2 P. M.]

Office of Hon. LYNN HELM, Los Angeles, Cal.

Wednesday, July 29, 1914, 2 o'clock P. M.

This being the time and place to which the further taking of proofs was continued, proceedings are now resumed.

Present: Hon. LYNN HELM, Special Master.
FREDERICK S. LYON, Esq., Solicitor for Complainant.
N. A. ACKER, Esq., Solicitor for Defendant.

[Testimony of George D. Parker, for Complainant.]

GEORGE D. PARKER, sworn as a witness on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. LYON.)

Q. 1. You are the defendant George D. Parker?

A. Yes.

Q. 2. In the verified report filed by you here today you have listed one sizer or grader as sold to the Benschley Fruit Company for $425, while the contract produced shows the sale of that grader and

(Testimony of George D. Parker.)

also a smaller sized grader. Is it a fact that such small size grader was also sold and installed for said company? A. Yes, sir.

Q. 3. And the price received was the sum of $195?

A. Yes.

Q. 4. You are acquainted with Mr. Gaddas of the Fruit Growers' Company, having a place of business here in Los Angeles?

A. I have met him once or twice.

Q. 5. Through him you sold three of the infringing Parker [52] graders and shipped the same to Porto Rico? A. No, sir.

Q. 6. Did you sell any of said machines for shipment to Porto Rico?

A. I sold some parts and wheels and so forth, but no complete grader.

Q. 7. What parts did you sell?

A. Castings and wheels.

Q. 8. Will your books show a list of the parts so shipped to Porto Rico? A. I believe not.

Q. 9. To whom were those parts, as you now call them, sold? A. Ruhlman.

Q. 10. Please describe in full each and all of such parts as were made and sold and shipped on that order or in connection with that order.

A. There were four drums—speaking of the main parts—four drums and the necessary bearings and stuff, and what we might style sizer units. That is all.

Q. 11. When these parts were assembled they would form how many graders or fruit runways?

(Testimony of George D. Parker.)

A. I don't know.

Q. 12. How many were they ordered for?

A. Two, I think.

Q. 13. Have you any correspondence in your records referring thereto? A. I may have.

Q. 14. I will ask you to search your records and produce at a subsequent hearing any books of account, lists of material or parts, or correspondence, referring to the manufacture and sale or shipment of these parts to Ruhlman in Porto Rico. Did you [53] ever do any business in connection with the shipment or manufacture of parts for graders with a man named Fletcher in Porto Rico?

A. No; not that I know of.

Q. 15. Did you ever have any other contracts for graders or grader parts with any other person, firm, corporation or association in Porto Rico other than this Ruhlman order? If so, state fully with whom and what. A. I don't think so.

Q. 16. Either in 1910 or eleven you set up in the packing-house of the Riverside Heights Orange Growers' Association at Riverside one of these infringing graders, and afterwards shipped it either to Florida or Porta Rico, did you? A. Yes.

Q. 17. To whom did such machine go?

A. I don't remember whether it went to Florida or to Ruhlman.

Q. 18. Will your books of account show where that machine went to? A. I expect they will.

Q. 19. That is not one of the two machines for

(Testimony of George D. Parker.)

which you shipped parts as heretofore testified by you, is it?

A. I am not sure whether that machine went to Florida or to Ruhlman.

Q. 20. (By the MASTER.) Can you answer the question?

A. If it is the one that went to Ruhlman, it is one.

Q. 21. (By Mr. LYON.) What is your recollection in regard thereto?

A. That it is one of them.

Q. 22. And your recollection is that that is the first machine that was shipped to Ruhlman in Porto Rico?

A. I couldn't say whether that was the one that went to Porto Rico or whether that was one that went to Florida.

Q. 23. If it went to Florida to what company did it go?

A. Either Mr. Skinner or Chase & Company. [54]

Q. 24. Did you ship to, or sell to, the Wachalla Citrus Association in Florida one of the infringing Parker graders? A. No.

Q. 25. Do your books of account show fully to whom and when and how many of these graders were from time to time made and sold and shipped?

A. Yes.

Mr. LYON.—We will have to ask that the books be produced, in view of the testimony of the witness.

The MASTER.—Well, you may go on with the next thing.

(Testimony of George D. Parker.)

Q. 26. (By Mr. LYON.) In this same statement or schedule of sales of Parker graders or sizers, I note that you have listed two graders as sold to Chase & Company, and two to L. B. Skinner & Company, but that no amounts or price therefor are carried in the last column or totaled in the total of that column. Why are these not carried in this total? A. I think they are in the total.

Q. 27. The total of $26,670 is the total shown on this page. A. I think so.

Q. 28. Then what is the indorsement on the last page of that schedule "Omitted from gr 2 $1,800, less cash $1,426.08," then a line and "$373.92"?

The MASTER.—Counsel for plaintiff says that the first two items omitted on the first page are not included in the total at the bottom of that page, but are carried over into the next and made separate items on the second page, and are therein added with the total on that page.

Mr. ACKER.—Yes; I don't think the witness knows anything about it.

The MASTER.—And that that was done by counsel? [55]

Q. 29. (By Mr. LYON.) What is the meaning of the entry to which I have just directed your attention on this last page, and, particularly, the item "less cash $1,426.08"?

The MASTER.—What does the item "less cash $1,426.08" mean?

Mr. ACKER.—That is "cost." It may be my poor writing, but it is "cost."

(Testimony of George D. Parker.)

Q. 30. (By Mr. LYON.) From what did you prepare this statement of "material for sizers" forming part of the statement filed by you here to-day, and having particular reference to the amounts in money set forth therein? Please explain to us how that was prepared.

A. That was done from one of the machines, all of them being of the same size.

Q. 31. By estimate?

A. No, sir; actual measurements.

Q. 32. Where did you get the rate of cost of materials used, as a basis for such figures?

A. In mill work it is from the mill that furnished the wood work, at $70 for each sizer.

Q. 33. And what items does that $70 last referred to cover? A. All the woodwork.

Q. 34. And from what did you take the cost of the 180 feet of 7" cotton belt, listed in this list?

A. From the regular lists provided by the wholesalers handling that material.

Q. 35. Is that figure given therein the list price?

A. No, sir.

Q. 36. What discount from the list price does it take into consideration? A. 55 off.

Q. 37. Was that 4-ply cotton belt? [56]

A. Yes.

Q. 38. Have you any of the bills showing what you actually paid on these various machines for such 7" cotton belt?

A. I don't think we have, as far back as that.

Q. 39. From whom did you purchase such cotton

(Testimony of George D. Parker.)

belt? A. Fairbanks-Morse.

Q. 40. Of Los Angeles, California?

A. Yes, sir; partly.

Q. 41. And from whom else?

A. Coffey Belting Company.

Q. 42. Of Los Angeles, California?

A. Yes, sir.

Q. 43. You say that the woodwork on these graders is figured at $70, the price at the mill. By whom did you have all of such woodwork done on all of the infringing Parker graders made and sold and covered by this report to which you have referred here in your testimony to-day?

A. Some from A. W. Miller and some from the Russ Lumber Company.

Q. 44. And some of the work was done in your own shop, was it? A. I think not; no.

Q. 45. Was it all done by contract?

A. Up to the time of that report, I think; yes.

Q. 46. Have you the bills of such companies for such work?

A. Only one that I have been able to find. That is one from the Russ Lumber Company.

Q. 47. Have you that with you? A. Yes.

Q. 48. Produce it.

A. (The witness produces a bill.)

Q. 49. I notice that this Russ Lumber Company statement or bill that you have produced calls for one whole sizer 1110 (I anticipate [57] that means feet) $70. What woodwork did that cover? The bins as well as the sizer parts? A. Yes.

(Testimony of George D. Parker.)

Q. 50. And what other woodwork was covered in this $70 item other than the bins and the grading machine proper? A. None.

Q. 51. I notice that in this statement of material for sizers that you have filed with your statement here, the same is itemized, and there is no such item of $70 including all woodwork. I will ask you now to take such statement and mark thereon in ink after each item with your initials each of the items which goes to make up this $70.

The MASTER.—Can you do that? Can you indicate and mark on there what items go to make up the $70? A. Yes.

The MASTER.—Read them into the record. Read the items that go to make up the $70.

Mr. ACKER.—Take each one of these that go to make up the $70.

Mr. LYON.—You don't want this marked?

The MASTER.—No.

Mr. LYON.—Let him mark this one (a copy), and then let Mr. Benjamin take it and copy it.

The MASTER.—Mark it with a "P."

A. This is wrong. That is the half sizer.

The MASTER.—Just make the check mark on this (the original).

A. (The witness does as requested.) [58]

(The following items are marked by the witness on the original report:)

4	2″ x 4″ x 20′ rest for roll stands.....	4.20
2	2″ x 4″ x 20′ cap for chain rail.....	1.89
72	Lin. ft. ¼″ x ¾″ hardwood guide for chain	1.50

(Testimony of George D. Parker.)

4	1″ x 5–½″ x 20′ belt rest	2.80
4	1″ x 4–½″ x 20′ belt rest	2.10
20	2″ x 4″ x 28″ base for roll stands	2.17
22	2″ x 3″ x 14″ upper rafter posts	.91
11	2″ x 6″ x 24″ upper rafter	1.54
2	2″ x 4″ x 51″ drum posts for extension	.63
1	2″ x 3″ x 16′	.56
1	1″ x 12″ x 16″	1.12
2	2″ x 4″ 48″ drum posts on drive end	.56
2	S–6, 1–3/16″ take-up boxes	4.80
2	1–3/16″ bracket boxes	4.80
20	2″ x 3″ x 37″ outside legs	2.10
20	2″ x 3″ x 34″ inside legs	2.03
20	rafters 2″ x 4″ x 50″	3.85
8	1″ x 1–¾″ x 18″ floor rails	1.68
10	1″ x 3″ x 60″ braces	.84
4	1″ x 3″ x 72″	.42
4	2″ x 6″ x 16′ canvas rail	4.48
4	2″ x 6″ x 20′ canvas rail	5.60
2	2″ x 6″ x 16′ board iron rail	2.24
2	2″ x 6″ x 20′ board iron rail	2.80
2	1″ x 1″ x 16′ rail for board irons)	
2	1″ x 1″ x 20′ rail for board irons)	.72
2	2″ x 4″ x 16′ rest for cull belt	1.47
2	2″ x 4″ x 20′ rest for cull belt	1.90
70	Lineal ft. 1″ x 1–¼ rounded cull b. r'l	1.05
3	1″ x 12″ x 20′ for sides and ends	2.70
	(In pencil)	63.46

(Testimony of George D. Parker.)

	(In pencil)	63.66
2	1″ x 12″ x 16′ for sides and ends	2.24
4	1–¼ x 12″ x 18′ stepping for cull belt	4.68
70	Lin. ft. of resaw 1–¼″ x 8″	2.70
70	Lin. ft. 1″ x 2″ rounded for cull b	.84
8	2″ x 3″ x 18″ cull belt posts	.42
18	1″ x 12″ x 39″ partition boards	4.20
	(In pencil)	78.74

Q. 52. (By Mr. LYON.)—After this woodwork had been completed either by the Miller Company or by the Russ Lumber Company, it was delivered direct to the place of erection of the machine? Is that your practice? A. To the railroad.

Q. 53. And did not enter your shop at Riverside at any time? A. No.

Q. 54. And were all of these graders, both large and small, set forth upon the Schedule A, forming a part of the report filed by you here to-day, and the machines shipped to Porto Rico, to which you have referred, contracted for in this same manner, so far as this woodwork just identified by you is concerned?

A. Yes.

Q. 55. And at this same price?

A. Miller was a little higher.

Q. 56. Was the price the same for the large and the small size, or what you have termed in your report "half graders"?

A. Proportionately as they appear in the charge there; yes.

Q. 57. Well, the two itemized statements marked

(Testimony of George D. Parker.)

"C" and "D" respectively, as part of this report, do not contain these items segregated and totaled in this manner, and, apparently, these schedules were not prepared from such bill. I will now ask you to state definitely what the cost was of all such mill work on the half size graders. If there is any difference in regard to [60] any of them, state what it was.

A. Proportionately the price was the same—

The MASTER.—The question is, what was the cost of the whole work on the small size grader.

A. 7 cents a foot. The figure is the same. 7 cents a foot for the finished material.

The MASTER.—And how many feet were there?

A. For the half sizer there is not quite so much as on the other, but it is figured at the same rate.

Q. 58. (By Mr. LYON.) Take, then, the item 4 2″ x 4″ x 20′ rest for roll stands 4,20″. Would that figure out at 7 cents per foot, or should that item then be $3.78?

The MASTER.—Ask him the first part of the question. Does that figure out at 7 cents a foot—that item. A. Yes.

Q. 59. (By Mr. LYON.) How many feet do you make? A. 60 feet.

Q. 60. And that is supposed to be board measure?

A. Yes, sir.

Q. 61. And would the same be true of the second item, "22″ x 4″ x 20′—" is that item figured at 7 cents a board foot?

A. That is what I attempted to figure it by.

Q. 62. Does it figure that way?

(Testimony of George D. Parker.)

A. I think there is a slight error there.

Q. 63. Of how much? A. Of 7 cents.

Q. 64. How many feet board measure do you figure for such timbers 2 x 4 x 20′?

A. 26 feet. I think it is about correct, after looking it over. There are 26–⅓ feet. I don't know whether this is copied right. [61]

Mr. ACKER.—That is the original that you have.

The MASTER.—That is practically right. There is only a fraction difference.

Q. 65. (By Mr. LYON.) On the second page of this schedule, to wit, that indorsed "Material for Adjustable Bins and Distributing System," appears the item 3 1″ x 12″ x 20′ for sides and ends $2.70. How many feet board measure did you figure in this item?

A. 60 feet.

Q. 66. And at what price did you figure that? 4-½ cents? A. Yes, sir; four and a half.

Q. 67. Why wasn't that figured at 7 cents, as you have said all this was figured at 7 cents?

A. That was stock, probably, which might have been sold for a lower rate.

Q. 68. That is one of the items you have checked in response to my request as to what was covered by this $70 rate?

A. In the item as covered by that bill; yes.

Q. 69. And you state that that bill was all figured at 7 cents? A. Practically figured at 7 cents.

Q. 70. Taking the subsequent item under the one I have called your attention to, 2 1″ x 12″ x 16′ for sides and ends $2.24. That is figured on a basis of 32

(Testimony of George D. Parker.)

feet board measure? A. Yes.

Q. 71. Both of these items to which I have last called your attention should represent respectively 20 feet and 16 feet long, and not inches, shouldn't they? A. I think so; yes.

Q. 72. What was the rate that you bought the 7" 4-ply cotton belt at per foot?

A. 34 cents.

Q. 73. And what discount did you have from that lnst price? [62] A. Fifty-five.

Q. 74. And at that what would 180 feet cost?

The MASTER.—What would 180 feet cost at 34, with 55 per cent off.

A. I am not on that page.

Q. 75. (By Mr. LYON.) You have not anything to do with that page. Answer the question. What would 180 feet at that rate and discount cost?

A. $27.54.

Q. 76. Was the price of the No. 45 chain standard during all the time of the manufacture of these infringing machines?

A. I paid 7 cents a foot for that.

Q. 77. Was that gross or list?

A. That was the net price.

Q. 78. Isn't it a fact that that could be bought in the open market at 6 cents per foot?

A. I think not, but I don't know anything about that.

Q. 79. Have you any of the bills for such chain?

A. I don't know.

Q. 80. From whom did you purchase such chain?

(Testimony of George D. Parker.)

A. Fairbanks-Morse I think, originally.

Q. 81. And from whom else?

A. From the Meese-Gottreich Company.

Q. 82. From whom did you buy the 48" canvas used in these infringing machines?

A. From Hoegee & Company.

Q. 83. And at what price net to you?

A. I don't know about that.

Q. 84. Have you any of the bills or any of the records which would show the prices paid therefor by you?

A. I am not sure as to that. Mr. Marks, my bookkeeper, has a [63] file where he keeps the price. He gave me the price.

Q. 85. Is the same true with regard to the 36" canvass used in these machines? A. Yes, sir.

Q. 86. Another item of this statement is 140 ft. 3" cotton belt. That was 3-ply belt?

A. Sometimes three and sometimes four.

Q. 87. Was there a difference in price between the two? A. Yes.

Q. 88. What were the respective prices, and were they uniform at all times during the manufacture of said infringing machines?

A. Practically uniform.

Q. 89. What were the respective prices for such respective 3-ply and 4-ply 3" cotton belt?

A. 3-ply 12 cents a foot, and 4-ply 16, with 55 off.

Q. 90. From whom did you buy that belting?

A. Fairbanks-Morse, principally.

Q. 91. And from whom else?

(Testimony of George D. Parker.)

A. I don't know anything about anyone else.

Q. 92. You operate and did operate during the manufacture of these infringing machines your own foundry, did you? A. Yes, sir.

Q. 93. And the price of the various metal castings enumerated in this schedule are figured upon the price that you made those castings for others. Is that correct?

A. We have charged the price of 4½ cents.

Q. 94. And you made those for customers at the same price?

A. Small pieces like that we sometimes charged more. Large, heavy castings, of course, bring a less rate.

Q. 95. You have now attempted in this schedule to list the actual cost of such castings to you? **[64]**

A. We have used the price of 4½ cents per pound for the entire castings going into the machine.

Q. 96. That price would include the machine work on these castings that are listed here? A. No, sir.

Q. 97. By whom was such machine work done?

A. Any particular man, have you reference to?

Q. 98. In your shop. A. In my shop.

Q. 99. And at what rate was such machine work charged in this schedule? A. 65 cents.

Q. 100. What rate per day do you pay the man who did that work? A. From 35 to 42 cents.

Q. 101. Then the balance of the charge of 65 cents for such machine work covered what?

A. That 65 cents is not far from the actual cost,

(Testimony of George D. Parker.)

when you figure the work that sometimes has to be done over again.

Q. 102. Is that the commercial rate for which you do such machine work for others? A. 75.

Q. 103. And this additional charge per hour, then, was made against this work to cover additional expense of the shop, shop equipment, etc., was it? To figure the total actual overhead expense of production? A. No.

Q. 104. Please explain why you charge in this schedule a greater amount for such machine work than you actually pay for having such machine work done in wages. Is that an estimate on the value of the use of the machines, or what?

A. I hadn't thought much of that.

Q. 105. Please make an answer to the question as to why that [65] was so charged in this schedule.

A. I just made up the price on that.

Q. 106. Referring now to items 2 sprockets, $5.60, what were the sizes and weights of such sprockets?

A. I have used the price that I would have to pay the wholesale houses for those parts.

Q. 107. Did you buy those parts at the wholesale house, or did you make them yourself?

A. I made most of them.

Q. 108. Then you did not actually pay anyone $5.60 for the two sprockets for each of these infringing machines, but in your statement you estimated the cost at that price?

A. We purchased some sprockets, but not all.

Q. 109. Do any of your books show the price of

(Testimony of George D. Parker.)

such sprockets that you purchased? [66]

A. No, sir.

Q. 110. What is your best recollection as to the number that you purchased? A. I have no idea.

Q. 111. How many of them did you cast at your own foundry? A. I have no idea.

Q. 112. How much did such sprockets weigh?

A. I don't know.

Q. 113. Is there any way that you can supply that information to us? A. I might guess at it.

Q. 114. Have you some of the same sprockets at your shop now? A. Yes.

Q. 115. Can they be weighed up? A. Yes.

Q. 116. I will ask you to do so and at the next meeting, or the first meeting in Riverside, you may give us that information. Also state what machine work, if any, is required thereon, and give us the same information in regard to the two drums which are listed here as "2 drums, drilled, $13.60," and the same information in regard to 2 S–6, 1–3/16" take-up boxes $4.80 and "2 1–3/16" bracket boxes $4.80," and the rate of wages paid each of the men who have worked on the items to which I have directed your attention, and in this connection you will, in reporting the rate of such wage, report the actual rate paid to the men who actually did this work.

Q. 117. In this statement is the item "22 roll stands with fruit guides $50." To what do those refer?

A. The sizer units and all the arms and castings going toward making a complete unit.

(Testimony of George D. Parker.)

Q. 118. What we term in this litigation a grader unit? A. Yes, sir. **[67]**

Q. 119. Were those manufactured entirely in your shop?

A. Yes; excepting the screws and bolts and things used.

Q. 120. I will ask you to give us an itemized statement of the time of the workmen employed upon the manufacture of these roll stands or grade units, and an itemized statement of the material put thereinto, and the cost of such material, and the actual cost of labor as actually paid by you in the manufacture of the actual roll stands and fruit guides as they went into these machines, and have this ready for us also at either the next hearing or the first hearing in Riverside. From September 30, 1909, to March 10, 1913, what other mechanical devices were you engaged in manufacturing and selling, other than the infringing graders? A. Box nailing machines.

Q. 121. What else? Narrate them all.

A. Weighers, washing-machines, and a general class of packing-house machinery.

Q. 122. Enumerate what things are in the general class.

A. Packing-house equipment is composed principally of weighers, sorting tables, elevators, washers and dryers, and brushers.

Q. 123. And were you also engaged in conducting a general machine shop and foundry business in the city of Riverside? A. Yes.

(Testimony of George D. Parker.)

Q. 124. For the general convenience of the public?

A. Yes.

Q. 125. Will your books show the gross business done by you from September 30, 1909, to March 10, 1913, the period covered by this statement "F"?

A. Yes.

Q. 126. Will it show the volume of each of these separate articles and devices manufactured by you?

A. I hardly think so; not segregated. **[68]**

Q. 127. Will they show on the books?

A. They will show in the shape of a total, which the bookkeeper might pick out. It would take quite a little time.

Q. 128. In the item of office expense, $6,089.03, what have you included, and how do you make up such item? First, however, answer this question: By whom was such item made?

A. I have had several bookkeepers, and it is only from the items they charged up as office expense.

Q. 129. You mean this is taken from a ledger account? A. Yes, sir.

Q. 130. By whom was it computed for this particular report? A. Mr. Marks.

Q. 131. You have no personal knowledge of this other than that he was directed to make an account?

A. No. I looked at the books myself, if that is what you mean.

Q. 132. Is that true of the other items of this schedule, statement "F"? A. Yes.

Mr. LYON.—We move, in view of the testimony

(Testimony of George D. Parker.)

of the witness, to strike this entirely from the record and exclude it from consideration, on the ground that it is incompetent and not the best evidence and not within the personal knowledge of the witness.

The MASTER.—The motion is denied. It will not be stricken out, but you can supplement it in any way you want to. I understand it is a statement made by these officials. There is no reason for striking it out. You can take exception to it or you can examine him further in reference to it. They may have other witnesses to support it. **[69]**

Mr. LYON.—In view of the testimony of the witness as to the lack of personal knowledge, I believe that is as far as I can go with the examination of this witness in these regards at this time.

The MASTER.—Do you want to cross-examine him now or after these other items are furnished?

Mr. ACKER.—I will cross-examine at the conclusion of his direct examination.

(By consent of counsel an adjournment is now taken until Thursday, August 6, 1914, at this same place, at the hour of 10:30 A. M.) **[70]**

[Proceedings Had August 6, 1914, 10:30 A. M.]

Office of Hon. LYNN HELM,
Title Insurance Building.
Los Angeles, Cal.
Thursday, August 6, 1914, 10:30 A. M.

This being the time and place to which the further

(Testimony of George D. Parker.)

taking of proof in this matter was continued, proceedings are now resumed.

Present: Hon. LYNN HELM, Special Master.
FREDERICK S. LYON, Esq., Solicitor for Complainant.
N. A. ACKER, Esq., Solicitor for Defendant.

Mr. ACKER.—The defendant on revising the statement as to the cost of each whole sizer, including adjustable bins, distributing system and installation, made an overcharge of $11.28, which makes an overcharge on the 72 sizers of $812.16, which would give as the proper cost of the 72 whole sizers and adjustable bins, distributing system and installation, $24,857.28 instead of $25,669.44 as originally reported, and making the profit on the whole sizers including adjustable bins, distributing system and installation, $3,917.72 instead of $3,105.56, as set forth in the statement on file.

On the half sizers, including adjustable bins, distributing system and installation, an overcharge of $9.48 was made in the statement as originally rendered, making an excess charge as to the cost of $123.24 on the 13 half sizers including adjustable bins, distributing system and installation, and making the total cost of $2,842.06, instead of $2,965.30 as contained in the report on file, and giving a profit for the half sizer, including adjustable bins, distributing system and installation of $962.94 instead of $739.70, as contained in the report on file, and making [71] a total profit on the 72 whole sizers

(Testimony of George D. Parker.)

and the 13 half sizers, including adjustable bins, distributing system and installation, of $4,880.66 instead of $3,845.26 as contained in the report on file herein.

Mr. LYON.—The difference in cost just stipulated by counsel for defendant is in the cost of what items, generally speaking?

Mr. ACKER.—The mistake made in the original report related to the cost given of the drums, the two S–5 and 6 bracket boxes, the sprockets and two S–7 and 8 bracket boxes, and in the cost as reported of the sizer stands, which items appear on the itemized statement now filed.

To the total profit of $4,219.18 appearing on the statement marked schedule A. should be added the overcharges of $980.76, making $5,199.94, to which should be added the sum of $45.12, making $5,245.06. The $44.96 is the overcharge on the four machines to Chase & Company and L. B. Skinner & Company.

Mr. LYON.—We accept the statement of counsel as a stipulation in so far as all of the items referred to by him are concerned, reserving, however, our exception to the overhead expense charge and to certain of the other items of cost to which we have directed the testimony of the witness, until such time as we have had an opportunity to examine the books at Riverside.

GEORGE D. PARKER, Recalled.

Direct Examination (Resumed).

(By Mr. LYON.)

Q. 133. Referring to the item in your account of

(Testimony of George D. Parker.)

140 feet of 3″ cotton belting, the list price which you paid for 4-ply was 16¢ per foot and for 3-ply 3″ cotton belt 12¢, both of these [72] list prices being subject to a discount of 55% allowed you. Is that correct? A. Yes.

Q. 134. And if you used 140 feet of this 3″ cotton belt, if such was 4-ply, the cost should be shown as $10.08? A. Yes.

Q. 135. And if you used 3-ply it should be shown as $7.56? A. Yes.

Q. 136. Is there any way in which you can determine on how many of these 72 full sized graders, or 13 small sized or half graders, you used 3-ply 3″ cotton belt, or 4-ply 3″ cotton beltings? A. No.

Q. 137. When did you commence using the 4-ply cotton belting?

A. We used 4-ply at first almost entirely.

Q. 138. When did you commence using the 3-ply?

A. I don't know.

Q. 139. From whom did you buy this belting?

A. Fairbanks-Morse.

Q. 140. In your statement you have shown that 23 yards of 48″ canvas was used. What ply canvas did you use in such machines? Three or four-ply?

A. I think that is No. 4—style No. 4.

Q. 141. Have you any receipted bill or invoice for such canvas that went into these machines?

A. (The witness produces a bill.)

Q. 142. Did you use this same No. 4 duck, 48″ in width, all the time, or did you use a cheaper and lighter grade part of the time in these machines?

(Testimony of George D. Parker.)

A. We used heavier on the bottom and lighter on the sides.

Q. 143. And this 23 yards in the item to which I have referred covers the bottoms and sides both, does it? [73]

A. I think there are two items there.

Q. 144. The following item of the statement is 8-yards of 36" canvas. Is that what you refer to as the sides? A. I expect so.

Q. 145. In all of the so-called Parker sizers covered by your report, as so far filed, did you use this No. 45 chain, or did you discontinue the use of that?

A. We discontinued that.

Q. 146. In how many of such sizers did you not use such chain?

A. I substituted a rope in place of it.

Q. 147. And what was the comparative cost of the rope? A. The rope was higher than the chain.

Q. 148. Have you now with you a bill, or can you produce the bills for such rope?

A. No. 55¢ a pound is what it cost. There were 8 feet to the pound. It may be only 50 cents. It was 50 or 55.

Q. 149. From who did you purchase such rope?

A. Fairbanks–Morse.

Q. 150. Is the price of such rope at 55 cents per pound, or 50 cents per pound, net, or is there a discount as purchased by you?

A. That is the net price.

Q. 151. Which was it, 55 or 50 cents a pound?

A. 55.

(Testimony of George D. Parker.)

Q. 152. I notice in this statement that you have an item of freight and expense of drawage $10 per machine. How do you make up that item in that account?

A. By taking the average distance of all the machines sold.

Q. 153. Is that made up by taking the total of all the freight and drayage for the 72 machines and dividing it by the number of such machines, or is it an estimate? **[74]**

A. It is taken on the mileage basis. It practically amounts to one-half a cent per 100 pounds per mile.

Q. 154. You do not pretend that you actually paid on each one of these specific machines the sum of $10 freight and drayage, but that it is an average charge as made in this statement? Is that correct?

A. Yes.

Q. 155. (By Mr. ACKER.) I understand that you added up the total mileage of all the machines and divided it by the total number.

A. Yes; because we have no other way of checking up each item of expense or freight..

Q. 156. (By Mr. LYON.) And what did you charge in this item of drayage expense?

A. That would be drayage on both ends.

Q. 157. Have you the statement of such averages from which this item was figured? A. No.

Mr. LYON.—I think I will ask that that be produced.

Q. 158. Then there is this further statement here:

(Testimony of George D. Parker.)

Traveling expenses $7.90, as the final item, and also in the statement of cost of material, etc., of sizers, there is a similar duplicate item of $7.90 traveling expenses. Why do you make such charge in such amount as against both of these statements, and how is that figured?

A. It would be almost impossible to make a total amount for each sizer that went to the different places, and we have arrived at that as being an average distance involving that amount of expense.

Mr. LYON.—I will ask that Mr. Parker produce his books with relation both to the freight and drayage expense, and these [75] traveling expenses, and we object to both of the items until there is some other proof than the mere general average and arbitrary statement. We give notice that they are not proven, and I shall ask the Master to disregard such items totally in these statements.

Q. 159. Will your books of account show the amount of labor, either in days or hours, expended upon any or all of these individual sizers and installations correctly? A. Not on all.

Q. 160. Then how have you arrived at the estimate of five days' labor erecting the full-sized sizers and sixteen days' labor erecting the bins and distributing portions of these sizers?

A. That is the proportion of the labor that was turned in by the men as correct.

Q. 161. Turned in by them when?

A. From time to time.

Q. 162. Did it vary on different installations?

(Testimony of George D. Parker.)

A. Oh, yes.

Q. 163. Who figured that estimate in this statement of yours? A. Mr. Marks.

Q. 164. You didn't figure it yourself?

A. Yes; I figured it myself. I checked it over with him.

Q. 165. You did not keep any accurate account, then, of the time of your workmen on these various installations in the building of these various sizers?

A. Some of them we have the right time, and some we have not.

Q. 166. I will ask you to produce your books in this regard at Riverside. In all cases where you sold these infringing sizers they were equipped with bins, were they? A. No.

Q. 167. In what cases were they not equipped with bins? **[76]**

A. Ruhlman got two that were not equipped with bins.

Q. 168. Were they the only ones that you remember of?

A. I am of the opinion that one or two went to Florida in the same way.

Q. 169. You are unable to identify those, however, are you? A. No.

Q. 170. The two that went to Ruhlman that you speak of are the graders that went to Porto Rico?

A. Yes.

Q. 171. At what price did you sell the graders that went to Porto Rico? A. $210.

(Testimony of George D. Parker.)

Q. 172. And those simply were the grader parts proper? A. Yes.

Q. 173. Covered by the statement B, I think it is. And have you been able from your books since the last adjournment to state whether there were two or three of such graders shipped to Porto Rico?

A. There were four.

Q. 174. Were they all complete, or were they two complete and two without the bins?

A. One was a 34-foot sizer with bins and everything complete, and one was a 54-foot sizer with bins and everything complete.

Q. 175. And the other two were simply the parts of the sizer proper?

A. Simply the parts of the sizers.

Q. 176. What was the price of the 54-foot sizer?

A. $354, I think.

Q. 177. Since the last adjournment have you ascertained that there were other sizers shipped to either Florida, Porto Rico, or out of the United States, by you, other than what have now been accounted for? [77]

A. The four to Ruhlman were the only ones that went out of the United States that I know of.

Q. 178. Your testimony on the 29th was to the effect that you sent the parts for the two sizers to Porto Rico for Ruhlman. Are those the parts of two graders to which you have just been referring?

A. Yes.

Mr. LYON.—In connection with the stipulation of

counsel, and to show that the corrections in cost referred to by him refer to parts, I offer in evidence the statement furnished by counsel and ask that it be marked Complainant's Exhibit Correction Sheet Items "I." (So marked.)

Mr. ACKER.—The exhibit refers to the statement of items referred to in the original report filed?

Mr. LYON.—Yes.

Q. 179. What items have you charged as office expenses?

Mr. ACKER.—I understood you to say that you are calling for the books on that. Why should we take testimony on that proposition?

Mr. LYON.—That is right. That is all of the examination of Mr. Parker at the present time.

(An adjournment is now taken until 2 o'clock P. M. of this day at this same place. **[78]**

[Proceedings Had August 6, 1914, 2 P. M.]

Office of Hon. LYNN HELM,
Title Insurance Building.
Los Angeles, Cal.
August 6, 1914, 2 P. M.

This being the time and place to which the further taking of proof in this matter was continued, proceedings are now resumed.

Present. Hon LYNN HELM, Special Master.
FREDERICK S. LYON, Esq., Solicitor for Complainant.
N. A. ACKER, Esq., Solicitor for Defendant.

GEORGE D. PARKER, recalled.

Direct Examination (Resumed).

(By Mr. LYON.)

Q. 180. You were directed, Mr. Parker, on July 29, 1914, to present here a statement of the number of the new style of graders manufactured and sold by you since the date covered by your sworn statement, here, and you have just presented to me a paper entitled "Schedule of Sales of California Improved Sizers, Including the Adjustable Bins, Distributing System and Cost of Installation." I ask you to state whether or not the names of the parties or associations herein set forth, the number of sizers and half sizers, so-called, and the amount therein set forth as the sale price, are correct and cover all of such installations so made by you of this type of grader, from 1909 to the present time? A. Yes.

Q. 181. Does this statement or sheet to which I have last directed your attention cover the entire United States, or only the State of California?

A. It covers all that I had anything to do with.

Q. 182. Then you are not now, and have not been since the entry **[79]** of the interlocutory decree, interested in the manufacture and sale of the devices referred to in this statement in the State of Florida?

A. No.

Q. 183. In no manner whatever?

A. I am furnishing them some goods down there—some brushes and things.

Q. 184. Did you furnish any grader parts to those people there? A. No.

(Testimony of George D. Parker.)

Q. 185. Who was it that put in the machine or machines like those covered by this statement in the State of Florida during the summer of 1913 or spring of 1914?

Mr. ACKER.—I object to that. The witness says he has nothing to do with any—

The MASTER.—The question is if he knows.

A. My brother is down there. I don't think he put in any of that type.

Q. 186. (By Mr. LYON). You had no connection whatever with the graders put in in Florida during the years 1913 or 1914? A. No.

Q. 187. Either as a stockholder in the company or as a partner in the business, or as receiving a part of the profits in the business?

A. Well, I do get a part of the profits.

Q. 188. Please state what that arrangement is through which you receive part of the profits in the manufacture and sale of such graders in Florida. Is the contract in writing? A. No.

Q. 189. Then please state the substance.

A. They are making brushers and dryers and numerous other things that go toward fitting up a packing-house, but I know they have not put in any sizers that are like these. **[80]**

Q. 190. When you say they are not like these, they differ in the manner in which several rollers or pieces of roller are mounted, is that correct?

A. I think not. No.

Q. 191. Please state what your connection with that business is.

(Testimony of George D. Parker.)

A. I guess you might call it a partnership.

Q. 192. Who are the partners? A. My brother.

Q. 193. And yourself? A. Yes, sir.

Q. 194. And what is the name of such partnership?

A. The Parker Machine Works. My brother has charge of it.

Q. 195. Where is it located? A. Tampa.

Q. 196. Are you and your brother equal partners therein? A. Yes.

Q. 197. Have you any personal knowledge as to the kind of graders manufactured by such partnership during 1913 and 1914?

A. Just as they describe what they have done, by letter.

Q. 198. Have you been in Florida during that time? A. No, sir.

Q. 199. (By the MASTER.) Have you got the letters? A. I couldn't say.

Q. 200. If you have they are out at Riverside?

Mr. LYON.—We will pass that till we get to Riverside. We offer the schedule last referred to and produced by the witness in evidence, and ask that it be marked "Complainant's Exhibit No. 2."

(The said exhibit is marked as requested.) **[81]**

Q. 201. (By Mr. LYON.) You have also produced another document entitled "Schedule of Sales of New Rolls for Parker Sizers." Does this statement cover all of the sales of such rolls for such Parker Infringing sizers other than what have been accounted for in your original statement?

A. Yes.

(Testimony of George D. Parker.)

Q. 202. Is the sale price therein set forth correctly set forth? A. Yes.

Mr. LYON.—We offer the schedule last produced by the witness as Complainant's Exhibit No. 3.

(Said exhibit is marked as requested.)

Q. 203. These sets of rolls referred to in Complainant's Exhibit No. 3 were furnished by you to the companies therein named for what purpose, Mr. Parker?

A. To take the place of the sizer units that was on the old machine.

Q. 204. I notice in this exhibit No. 3 you state that you have sold to the Anaheim Orange Growers' Association two whole sets new rolls and one half set of such new roll. For what did you furnish such half set?

A. At their request. They built a half sizer themselves and they wanted the rolls.

Q. 205. And you furnished the rolls to complete such sizer?

A. I guess so. That is what I suppose they done with them.

Q. 206. Did you furnish any other material or parts for such half sizer other than the half set of rolls referred to in Complainant's Exhibit 3? [82]

A. I furnished them some pulleys or drums.

Q. 207. Anything else? A. And belting.

Q. 208. Do your books show an account of this?

A. Yes.

Q. 209. I will ask you to produce that at Riverside to-morrow. You have also produced 12 typewritten

(Testimony of George D. Parker.)
sheets of account of material for sizers, labor and expense of installation, cost of material, labor and expense of installing adjustable bins and distributors for one sizer, cost of material, labor and expense of installing one half sizer, cost of material, labor and expense of installing adjustable bins and distrubutor for one half sizer, a sheet of tabulation and a sheet entitled "Overhead Expenses," which I will ask to be marked Complainant's Exhibit 4, and ask you to state to what these refer.

A. They refer to the type of sizer which we are now building, which in no way is in infringement of the original patent of Mr. Stebler.

Mr. LYON.—With the consent of the Master, after examining this, we will ask leave to question Mr. Parker further in regard to this particular statement.

[Testimony of Fred Stebler, for Complainant.]

FRED STEBLER, produced as a witness on behalf of complainant, and being first duly sworn, according to law, testified as follows:

(By Mr. LYON.)

Q. 1. You are the complainant in this suit?

A. Yes.

Q. 2. How long have you been engaged in the manufacture and sale of fruit graders, in accordance with the patent in suit? [83]

A. For about ten years.

Q. 3. In a general way, since 1908, please state what your equipment has been.

(Testimony of Fred Stebler.)

A. You mean our shop equipment for manufacturing?

Q. 4. Yes.

A. We have had a complete foundry, a complete machine-shop and a complete wood-shop, containing all the necessary tools, machines and devices with which to handle our business.

Q. 5. What besides these graders have you during the period of time from 1908 to the present date manufactured and sold from said shop?

A. We manufactured various kinds of devices; dry cleaning machines to clean oranges, washers, clamp trucks, elevators, and, in fact, everything that enters into a packing-house.

Q. 6. You have examined the statement filed on behalf of the defendant Parker herein?

A. Yes, sir.

Q. 7. During the time covered by such statement, state whether or not any of the orders for sizers therein set forth were solicited by you, and, if so, the circumstances thereof.

A. The greater part, if not all, of those orders were solicited by me. I do not remember of any instance in which they were not solicited in some manner, either by letter or personal interview.

Q. 8. What are the facts in regard to any of said concerns asking for bids upon such installations from you?

A. The facts are that I guess in most instances I was allowed to make an estimate or put in a bid for them. In some instances I was not.

(Testimony of Fred Stebler.)

Q. 9. During the time covered by and at the times covered by said contracts and statement, what was the condition of your [84] factory as to equipment, etc., to handle or have built the sizers, and install the same, covered by such statement and contract of the defendant George D. Parker?

A. Our equipment was entirely adequate.

Q. 10. And were you prepared to have completed said machines and installed the same?

A. Yes, sir.

Q. 11. That applies to the complete machines and complete installations? A. Yes, sir.

Q. 12. What additional expense would it have made to your business?

A. None other than the proportionate amount of labor for the actual handling of the machines.

Q. 13. If I understand your last answer, it would have added nothing to the overhead expense of your business. A. None whatever.

Q. 14. Can you produce a statement of, or state what, during the time covered by the infringement of the patent herein by the defendant George D. Parker, has been the cost to you of manufacturing and installing a complete grader such as you have sold under the patent in suit, and which, as you say, was directly competed with by Mr. Parker in securing most, if not all, of the orders for sizers covered by the statement herein filed by him?

A. I have here an itemized cost account showing the list of all the parts entering into these machines, and the cost thereof, which shows a total cost to me

(Testimony of Fred Stebler.)

of installing those machines of $236.05.

Q. 15. I notice in the statement that you have just produced an item "Overhead Expense 2% on selling price of $250," on the list entitled "List of parts for belt distributing system not [85] including grader," and an item of overhead expense of 2% on the selling price of $175 on the other sheet. How do you figure that 2% overhead expense?

A. Well, I had the bookkeeper take the total expense account from our books as closed for the past year previous to this, and took the actual overhead expense shown therein, which includes insurance, taxes, light and power, and office stationery, and his own labor account, and I think the advertising, and I think some traveling expense. That is all I recall.

Q. 16. (By the MASTER.) And then what?

A. Then that amount totaled up averaged about 2% on our actual gross business on everything.

Q. 17. (By Mr. LYON.) In other words, 2% of your gross business of all kinds handled by your business in the shop?

A. Yes. I think it includes also our depreciation.

Mr. LYON.—For the Master's convenience I might state that it is complainant's contention that while these two statements call for this 2% overhead expense, that in this accounting, in view of the witness, no overhead expense is chargeable in computing the damage or loss of complainant by reason of the infringement, as it is shown that the business was carried on to the same extent as though such graders were actually manufactured and sold. In other

(Testimony of Fred Stebler.)
words, the complainant is paid for his overhead expense and it should not be taken out twice.

Q. 18. (By Mr. LYON.) What other expense, Mr. Stebler, to your shop other than these materials and the actual labor and the other items, other than the overhead expense of 2% to which I have directed your attention as included in these two sheets of the statement, would there have been to your shop if you had manufactured and sold the 70 or 80 machines covered by the defendant's accounting herein? [86]

A. Nothing more than the 2% already shown.

Mr. LYON.—We ask that the two sheets produced by the witness be filed in evidence as "Complainant's Exhibit No. 5, Complainant's Cost."

(The said document is marked Complainant's Exhibit 5.)

Mr. ACKER.—To the introduction of which we object on the ground that they do not correctly represent the cost price of the machines to which they relate so far as they refer to the overhead expenses, and so far as they refer to the expense of installation. The other features of the statement I will stipulate are correct.

The MASTER.—The objection is overruled. You can cross-examine when your turn comes on that matter.

Mr. LYON.—That is all at the present time. The witness will be recalled in regard to these other machines. But that is all in regard to this question of his cost price.

The MASTER.—You say he will be recalled as to

(Testimony of Fred Stebler.)

the other machines?

Mr. ACKER.—I would like to have the witness' examination completed, so when I cross-examine I can cross-examine him as to all he testifies to.

Mr. LYON.—The reservation was as to the other type of machines. I can go ahead and examine him on that, but I understood the Master to say that he preferred to hear it after he saw the machine.

Mr. ACKER.—Do I understand that you have completed the examination of Mr. Stebler so far as relating to all the machines held to be an infringement?

Mr. LYON.—No. I mean to say that I have completed the examination of this witness as to showing what his damage is, based upon the cost of manufacture and sale price, with one [87] exception, and I want to ask one further question.

Q. 19. (By Mr. LYON.) Had you during the time of this infringement from 1908 to the present time, any established price for such graders? If so, state what it was.

A. Yes; we had an established price of $425.

Q. 20. And was that same price of what is called here the large size or double grader and the half size or single grader?

A. That was the price of the double grader.

Q. 21. And the price of the small size or half or single grader was what? A. $225.

Q. 22. Was that price uniform at the time that this infringement started, and during all the time of the infringement? A. Yes.

(Testimony of Fred Stebler.)

The MASTER.—Now, Mr. Lyon, I understand that when you recall Mr. Stebler you desire to recall him as to the infringements subsequent to the decree, and not as to damags.

Mr. LYON.—That is it. But it may be in reference to damages so far as those subsequent to the decree of infringement, but not in regard to the machines accounted for in Parker's first statement.

The MASTER.—You may cross-examine.

Cross-examination.

(By Mr. ACKER.)

Q. 23. I notice in the statement supplied by you given as one item "Overhead Expense 2% on selling price of $175." Please state what the selling price $175 refers to.

A. That refers to the parts of the machine as shown in that sheet.

Q. 24. That is, you mean, it refers to the grader?

A. The upper part, yes; the grader. [88]

Q. 25. Please state in what houses, if any at all, you have installed the grader referred to on sheet one of the statement introduced in evidence as exhibit 5.

A. Do you wish them all?

The MASTER.—Go ahead.

A. I can't give them all from memory; I can give a few of them. There is the Sierra Vista Packing Company, of Riverside; there is the Santiago Orange Growers' Association, at Orange; there is the Placentia Orange Growers' Association at Fullerton and Placentia; there is the Pomona Fruit Growers' Exchange and the Indian Hill Citrus Association at

(Testimony of Fred Stebler.)

North Pomona; there is the Claremont Citrus Association, the Covina Citrus Association; Covina Orange Growers' Association, and the Charter Oak Citrus Association, and the La Verne Orange Growers' Association; there is the Upland Citrus Association, the Upland Heights Orange Association; the Citrus Fruit Association of Ontario; the West Ontario Citrus Association; the Glendora Citrus Association; Glendora Heights Orange and Lemon Association; Fernando Fruit Growers' Association; Duarte and Monrovia Fruit Exchange; the Pasadena Orange Growers' Association; the Whittier Citrus Association.

Q. 26. (By Mr. ACKER.) That is sufficient. Do I understand that at each of the packing-houses you refer to the grader was installed without the distributing system and the adjustable bins?

A. No, sir. Your question didn't ask that.

Q. 27. Were all the graders that you have referred to as having been installed in said packing-house of the same size as the grader referred to on sheet one of exhibit 5?

A. Yes; with the exception of those that were installed previous to the getting out of the belt distributing system.

Q. 28. That is, all 23-foot graders?

A. Yes, sir; with that exception. [89]

Q. 29. And on what did you base the selling price of $175, for the grader?

A. That was our selling price on the grader before the demand for the belt distributing system.

(Testimony of Fred Stebler.)

Q. 30. Referring to the advent of the distributing system, I understand you placed the grader on the market for the sum of $175? A. Yes, sir.

Q. 31. Did that price of $175 include the adjustable bins? A. No, sir.

Q. 32. Did it include any of the matter referred to on the second sheet of exhibit 5? A. No, sir.

Q. 33. The distributing system is covered by a separate patent from the patent in suit?

Mr. LYON.—Objected to as irrelevant, immaterial and incompetent, and not the best evidence, and not involved in this case.

The MASTER.—Overruled.

Mr. LYON.—Note an exception.

A. Yes, sir.

Q. 34. (By Mr. ACKER.) Will your books disclose the exact cost of the installation referred to in the packing-houses which you specified in answer to a previous question, so far as the labor and workmanship is concerned in installing the grader referred to in your statement, and in which you gave the selling price of $175? A. No, sir.

Q. 35. How did you arrive at the cost or expense incident to erecting the said grader in the packing-houses?

A. By keeping in personal contact with the men putting machines up.

Q. 36. Did you yourself keep a personal account of the men engaged [90] in installing of each of the graders referred to on sheet one of exhibit 5, and which you have testified were installed in those vari-

(Testimony of Fred Stebler.)

ous packing-houses?

A. I kept no record; I simply kept my eyes on the men doing the work.

Q. 37. How did you arrive at the expenss of two men, one day, at $5, $10, as the expense of erecting?

A. Simply because I required those men to do that.

Q. 38. That held good in every installation?

A. Not every installation.

Q. 39. Were more men employed in one installation than in others? A. Sometimes.

Q. 40. How many at any one time were required for an installation?

A. The proposition is this: If we had one machine to put up somewhere, as we very often did, we would send two men, and the rule is—not the rule, but the result is—I watched it—usually the result is that those two men put up the machine in one day. Of course, in other places where we might have anywhere from one to four or five machines to put up and other work in addition it would be pretty hard to keep an accurate account of it. But in a great many cases we have put up one machine and nothing else and that is what we got.

Q. 41. In every case where only one machine was involved, the same was installed and erected in the packing-house by two men in one day?

A. Approximately, so far as I can recall.

Q. 42. Is this item of $10 simply based on memory?

A. It is based on memory to that extent; yes. And on experience and personal contact. [91]

Q. 43. Have you an account of any one house?

(Testimony of Fred Stebler.)

A. No, sir.

Q. 44. You kept no record of it—

A. We kept no detailed cost account.

Q. 45. How did you arrive at the cost account of the schedule introduced in evidence?

A. Simply by putting the items and material through the shop and following it.

Q. 46. That is, for the purpose of making this statement? A. Yes, sir.

Q. 47. You have no knowledge of the actual cost of installing other than as you just testified to, by making this statement over at your shop for the purposes of this examination? A. No, sir.

Q. 48. How many graders did you install for the Riverside Heights Fruit Company?

A. I have forgotten; probably five, as near as I can recall.

Q. 49. Do you know what the price of those graders was?

Mr. LYON.—Objected to as immaterial until the date is shown, or the type of grader. The question of our established price is one of established price during the term of the infringement, and not some period prior or subsequent thereto.

Q. 50. (By. Mr. ACKER.) Please examine the bill which I hand you, and state what that relates to.

Mr. LYON.—I make the same objection. It appears from the document that it was years prior to the date of the infringement.

The MASTER.—I think that is a good objection. I don't think it is necessary to go into this thing ex-

(Testimony of Fred Stebler.)

cept during the time of the infringement.

Mr. ACKER.—I simply want to show the established selling price. [92]

Mr. LYON.—We have a right to raise our price and lower it as much as we want to.

The MASTER.—You may offer it subject to the objection. The objection is sustained.

(Marked Defendant's Exhibit 1.)

Q. 51. What was the form of grader installed by you for the College Heights Orange Association of Claremont, California?

A. As I recall it it was the short sizer with the belt distributing system.

Q. 52. Did that installation involve the grader which you have referred to in your sheet I, of exhibit 5, as selling for the price of $175? A. Yes, sir.

Q. 53. How long have you maintained the price of $175 for the grader referred to in sheet I, of exhibit 5?

A. Well, since prior to this infringement.

Q. 54. Was that the selling price prior to the infringement? A. Yes.

Q. 55. As I understand you, $175 was your established selling price for the grader referred to in sheet I, of exhibit 5.

Mr. LYON.—Objected to as calling for a conclusion. If it is to be inferred from that that the selling price was for that—

Mr. ACKER.—I understood the witness to testify that he had sold the grader referred to in sheet I, exhibit 5, and sold it separate from the distributing

(Testimony of Fred Stebler.)

system and the adjustable bins. Is that not the fact?

A. Not subsequent to this infringement.

Q. 56. Prior to that?

A. Prior to that; yes. [93]

Q. 57. And the established price at that time was $175?

A. Yes. But let us not misunderstand each other. The grader at that time was $175 and did not include the cull belt, which was later included.

Q. 58. And the cull beltings are the cull belts referred to on sheet I, exhibit 5, and as being embraced in the greater selling for $175? A. Yes, sir.

Q. 59. (By Mr. LYON.) Look at those two sheets and see which one of those you have been testifying to, so that there will be no mistake.

A. No; we have got in wrong here. Sheet I, as you have it marked here, is the belt distributing system. I think these are simply marked wrong. Just turn them over and mark them reversed and you will have them right.

Q. 60. (By Mr. ACKER.) Do your books show the amount of time devoted by you in installing the fruit grader in the College Heights Orange Association at Clarement, California?

A. I am afraid not segregated; no.

Q. 61. Is there any thing or any record in your establishment which will show the time of the men expended in installing the fruit grader in connection with the College Heights Orange Association, by which I mean the fruit grader referred to on sheet I of exhibit 5. A. I think not.

(Testimony of Fred Stebler.)

Q. 62. I wish you would make an examination of your books for the purpose of telling.

A. I can tell you now there is no use of making an examination. The time is not kept in books. We have regular time tickets which I feel very sure have been destroyed for that time. And even that, I don't think, is segregated. The men turned in their time per day, but not usually segregated between the different [94] parts of the machine.

Q. 63. How would you arrive at the freight item on sheet I of exhibit 5?

A. This way: I know from having shipped a number of these machines separately that the average shipping rate is about a ton or 2,000 pounds, and I also know the rate, which is the first class rate, and the average distance which I took at Glendora. That would be our average distance for Southern California. And it would be about 23 cents—the first class rate— and that is, I think, as accurate as can be obtained. The weight is the average weight, and the rate can be verified.

Q. 64. How many miles from Riverside to Glendora?

A. In the neighborhood of 40 to 50 miles.

Q. 65. Do you consider that the average mileage in connection with all the graders?

A. Yes, sir; in Southern California.

Q. 66. Then you have got the freight rate by a general average? A. Yes, sir.

Q. 67. In the same way that Mr. Parker arrived at his freight rate? A. I don't know what he did.

(Testimony of Fred Stebler.)

Q. 68. You understood that he said he arrived at it by a general average?

A. Yes, sir; I so understood it.

Q. 69. Have you any record which will show the gross business of your establishment since the commencement of the infringing act herein complained of? A. No; our books don't show it.

Q. 70. How did you arrive at the 2% overhead expense? [95]

A. That was taken from our last year previous to this.

Q. 71. Have you all the records in your establishment from the last year previous to this as to the expense in connection with your business?

A. I won't be sure that I have all of them.

Q. 72. Have you all the data at your place of business on which you made this expense item referring to the overhead expense? A. I think so.

Q. 73. And that would show all the business done by you in connection with the other lines of machinery?

A. As a whole; as a gross, yes, but not separated.

Q. 74. Would you be able to separate from the gross amount of business the business which was done in connection with the fruit grader during that period?

A. No; I think not, for this reason: In a great many instances graders were sold under contracts in connection with other articles. We made the contract as a whole and not itemized.

Q. 75. Prior to the manufacture of the machines

(Testimony of Fred Stebler.)

involved in the present accounting, were you engaged in the manufacture of what is known as the California Grader?

Mr. LYON.—Objected to as not cross-examination, irrelevant and immaterial, and a matter which has been entirely passed on both by the District Court and by the Court of Appeals, in this case.

Mr. ACKER.—It was passed on as an anticipation. I am not examining him as to the anticipation.

The MASTER.—In what way is it material?

Mr. ACKER.—It shows the difference between the cost and selling price of the California grader over this grader. [96]

The MASTER.—The objection is sustained.

Mr. ACKER.—Exception.

Q. 76. Have you ever made a grader 34 feet in length? A. Yes, sir.

Q. 77. What was the price in connection with the 34-foot grader? A. I should say $175.

Q. 78. I mean the cost price—shop expense.

A. I haven't that.

Q. 79. Have you any way of figuring that out?

A. No, sir; not now.

Mr. ACKER.—That is all I care to ask Mr. Stebler, with the exception that I would ask him to examine his books and endeavor to give us a somewhat more accurate statement as to the labor incident to installing these plants. I did not suppose two men could put them up in a day. I think his charge of $10 is an exceedingly small item.

(Testimony of Fred Stebler.)

Redirect Examination.

(By Mr. LYON.)

Q. 80. What have you to say in regard to the cost of installing these graders, based upon your experience in your business and observation of the installation thereof, as to the length of time and cost of said installation?

A. Nothing further than what I have practically testified to, in following as I do personally all my work. I know as a rule with men, from my experience, about how long this work takes. For instance, I know of at least one case where I sent two men to East Highlands to put up one of these graders of the longer type in the house of the Stewart Fruit Company. These were not high priced men, either. I paid one $2.50 a day and the other [97] $3 a day. And I know they put that machine up in one day. That is about as positive as I can put it. It is on such observations as this that I base my statement.

Q. 81. Have you other instances that you could recall of the particular time and the particular men installing the grader?

A. No; I do not recall any particular instances just now.

Q. 82. Again looking at Complainant's Exhibit No. 5, how do you derive from this statement the cost of building and installing the single or small size or half-grader?

A. Simply by dividing the amount by two, for the reason that with a few exceptions there is just half the amount of material in them, and consequently

(Testimony of Fred Stebler.)

half the amount of labor.

Q. 83. You say "with a few exceptions." What exceptions?

A. The exception is this: Ordinarily a half grader is backed up against the wall or built against the wall, in which case the machine is practically cut in two through the middle. The exception is where the machine is set out on the floor and we have to supply the extra back supports to hold up the outside.

Q. 84. When you say "back supports" you mean the legs of the frame?

A. The legs of the frame which would be used in setting a double grader.

Q. 85. What would be the cost of such back legs used?

A. There are 32 of them shown on sheet II, exhibit 5, at a cost of $2.96.

Q. 86. And you would divide that item in two in case the half grader was set out from the wall?

A. Well, we would divide the item of $236.05 by two, and add $2.96 to the quotient.

Q. 87. When you stated that you sold the graders at $175 for [98] the upper portion of the grader, what have you to say as to the orders for equipment including more or less than what is shown on sheet I, as to a complete and operative machine as sold by you during the term of this infringement?

A. I don't know just what you want.

Q. 88. What I mean, is, did your order include simply such portions, or did it include the portions comprised on sheet II, in order to make a complete machine?

(Testimony of Fred Stebler.)

A. Well, with a few exceptions the grader was invariably supplied with bins of some kind. The grader, of course, is of no*t* value without bins. The exceptions were in cases where some other grader had been in use and they had the bins for it, and they took the old grader off and put the new grader on with the old bins, in that manner giving them a complete machine.

Q. 89. In other words, the old grading runway was removed and the runway of this particular patent was mounted simply on the bins of the old installation. Is that correct?

Recross-examination.

(By Mr. ACKER.)

Q. 90. What did you pay your men engaged on the outside work or erecting the graders referred to in sheet I of exhibit 5?

A. We have no fixed price. We have paid all the way from $2 to $5 a day.

Q. 91. You have given as outside labor work the item of two men and expenses $5 a *w*ay, amounting to $10. Please tell me exactly what is included in that item.

A. Their wages and such incidental expenses as they were allowed.

Q. 92. What wages were paid those men? [99]

A. I was just saying we have no fixed definite rate. I simply have to strike an average.

Q. 93. At what rate did you figure in compiling this labor? A. $3.50 for labor.

Q. 94. And what were the expenses which added

(Testimony of Fred Stebler.)

to the wages made $5 a day per man?

A. $1.50 per man.

Q. 95. What were they?

A. Their mileage and sometimes meals, but not always.

Q. 96. Please examine this letter and state whether it is a letter written by you to the parties addressed.

Mr. LYON.—Objected to on the ground that it appears from the letter that it is dated September 12, 1904, three years prior to the commencement of the infringement, and can have no bearing as fixing the established price or the cost of manufacture during the period of the infringement herein.

The MASTER.—The objection is overruled. Answer yes or no.

A. Yes; that appears to be a letter written by me.

Mr. ACKER.—We offer it in evidence, and ask that the same be marked Defendant's Exhibit Stebler Letter "A."

Mr. LYON.—The objection is repeated to this offer.

The MASTER.—The objection is sustained.

A. I don't think it bears my signature.

Mr. ACKER.—The letter is not offered for the purpose of establishing a selling price, but to show the construction that this witness as the owner of the patent places on the grader therein covered.

The MASTER.—That would not be material here on an accounting.

Mr. LYON.—The same objection is made, inas-

(Testimony of Fred Stebler.)
much as it was his [100] business policy and manner of doing business and making a profit at that time. But it is years prior to this controversy, and he has a right to change prices and methods of handling the patent at any time he desires.

The MASTER.—The objection is sustained, and it will be marked exhibit 2.

(Marked Defendant's Exhibit 2.)

(An adjournment is now taken until to-morrow, Friday, August 7, 1914, at the hour of 11 o'clock A. M. at this same place.) [101]

[Proceedings Had August 7, 1914, 11 A. M.]

Office of Hon. LYNN HELM,
Title Insurance Building,
Los Angeles, Cal.,
Friday, August 7, 1914, 11 o'clock A. M.

This being the time and place to which the further taking of proofs in this case was continued, proceedings are now resumed.

Present: Hon. LYNN HELM, Esq., Special Master.
FREDERICK S. LYON, Esq., Solicitor for Complainant.
N. A. ACKER, Esq., Solicitor for Defendant.

The Master, together with counsel for both parties and the reporter, thereupon proceeded to the city of Pomona, Los Angeles County, California, where the Master and counsel proceeded to the packing-house of the Pomona Fruit Growers' Exchange and inspected machines of the type and construction manufactured by complainant under the patent in suit,

(Testimony of Fred Stebler.)

and machines manufactured by the defendant Parker under the Parker patent referred to in the interlocutory decree herein.

Whereupon the aforesaid parties proceeded to the town of Rialto, San Bernardino County, California, where at 3:45 P. M. the said party visited the packing-house of the Orange & Lemon Association and inspected a machine built by complainant under the reissue patent in suit and also a certain other grader arranged near the west wall of the packing-house of said company and in regard to which defendant called Edgar R. Downs, who testified as follows:

[Testimony of Edgar R. Downs, for Defendant.]

EDGAR R. DOWNS, produced as a witness on behalf of defendant, and being first duly sworn according to law, testified as follows: [102]

Direct Examination.

(By Mr. ACKER.)

Q. 1. Please state your name, age, resident and occupation.

A. My name is Edgar R. Downs; I reside here in Rialto; I am the secretary and manager of the Rialto Orange & Lemon Association.

Q. 2. For what length of time have you been such secretary?

A. Between two and three years that I was manager; but I was secretary before that and employed in the office here since December, 1907.

Q. 3. Do you use in the packing-house of the Rialto Orange Association any machinery for the grading of fruit? A. We do.

(Testimony of Edgar R. Downs.)

Q. 4. If so, what machines are used?

A. These sizers or graders that are employed out here, said to be manufactured by Stebler, and one of them that was here—I don't know the pedigree of it.

Q. 5. You say there was one that you do not know the pedigree of. For what length of time was it in use in the packing-house to your knowledge?

Mr. LYON.—We object to that as irrelevant, immaterial and inadmissible, and on the ground that it is not proper to show any matters with regard to the prior art under the reference here, save and except in so far as the same might apply to the question of the profits derived from the use of the infringing machine by the defendant Riverside Heights Orange Growers' Association, and if such evidence is offered for any other purpose we submit that the matter is *res adjudicata* between the parties as to the condition of the prior art and as to the construction to be placed on the patent in suit; and before the Master the defendant cannot make any further or additional showing of the said prior art than what they have made in their case in chief. [103]

The MASTER.—The objection is overruled.

Mr. LYON.—Exception.

A. To my knowledge it has been in use for seven years. That is, it was in use when I came here in December, 1907.

Q. 6. (By Mr. ACKER.)—What machine have you reference to in your last answer?

A. The one against the wall.

Q. 7. In your packing-house?

(Testimony of Edgar R. Downs.)

A. In this packing-house, to the extreme west, against the wall.

Q. 8. I hand you a series of photographs and ask you to examine the same and ask you to state whether you can identify those photographs or not.

A. The one I mean is this one.

Q. 9. Referring to the photograph you have just handed me?

A. It is shown here against the wall.

Q. 10. Do these photographs all relate to the same machine?

A. They show more than one here. For instance, this one shows two. This is the one that is shown against—these are the same. Here is another one, and here is the one against the wall.

Q. 11. These three photographs refer to the same machine. Is that what you mean? A. Yes, sir.

Q. 12. There is the machine which you say was in use in the packing-house when you took employment here seven years ago? A. Yes, sir.

Mr. ACKER.—I wish to introduce these in evidence and ask that the same be marked respectively Defendant's Exhibits Photos Grader 3, 4 and 5.

Mr. LYON.—The same objection is noted to the questions asked the witness in regard to this grader or its use—that it is incompetent, irrelevant and immaterial upon this matter, and not [104] admissible, and *res adjudicata.*

The MASTER.—The objection is overruled. I think the exception that you put into your objection is enough to admit the evidence.

(Testimony of Edgar R. Downs.)

Q. 13. (By Mr. ACKER.) What is the length of the machine which you have referred to as against the wall and as having been in use for the seven years?

A. I should say about 32 feet. I don't know exactly.

Q. 14. How are the rollers in that machine connected, if connected at all? A. I cannot say.

Q. 15. You can examine the machine and then state, can you not? A. Yes, I could.

Q. 16. Please go out and examine the machine.

IT IS STIPULATED on the record that the rollers constituting the rotating wall of the gradeway of the grader referred to are connected one to the other for rotation, and they are all driven in unison from power applied at one end by means of a sprocket.

By Mr. ACKER.—Do you also admit that the bearings of the rollers adjust the rollers from and toward the fixed member of the runway?

Mr. LYON.—As to the whole; yes.

Mr. ACKER.—What do you mean by that?

Mr. LYON.—That there is no separate and independent adjustment of the openings.

Mr. ACKER.—Will you stipulate that the rollers of the grader constituting the rotating wall member of the runway are mounted in bearings, which bearings are adjustable toward and from the fixed member of the runway to vary the position of the rotating rollers relative thereto, the adjustable bearings separating two ends of adjacent rollers? [105]

The MASTER.—Only every other end?

(Testimony of Edgar R. Downs.)

Mr. ACKER.—Yes; every other bearing covers two adjacent ends.

Mr. LYON.—Yes. Subject to the objection as to the admissibility of such evidence, and with the reservation that the manner of supporting and adjusting the roller side of the runway of said grader is not such as to permit in any manner the individual adjustment of separate grade openings formed by the roller surface and the belt, and that in this respect the machine corresponds to the California grader as set forth in the record herein and covered by the testimony of both complainant's and defendant's witnesses. In other words,—

The MASTER.—Is that accepted?

Mr. ACKER.—Yes; that is all right. Will you stipulate that the machine concerning which the witness has testified is licensed under the Ish patent?

Mr. LYON.—I will stipulate that after this corporation, the Rialto Orange & Lemon Association, manufactured said machine in 1905, they were called upon by the complainant herein as the owner of the Ish patent and—

Mr. ACKER.—What was the date of that license?

The WITNESS.—The date in the book is March 11, 1905.

Mr. LYON.—And on March 11, 1905, said Rialto Company paid to the complainant herein the sum of $50 as a license fee under the Ish patent.

The MASTER.—Is that satisfactory?

Mr. ACKER.—That is all.

Mr. LYON.—That is all.

(Testimony of Edgar R. Downs.)

The party thereupon proceeded to Riverside, California, where the packing-house of the defendant Riverside Heights Orange Growers' Association was visited and where machines built by defendant [106] Parker and installed therein were inspected and certain tests made by the defendant Parker in the presence of the Master, and thereupon an adjournment was taken until 8 o'clock P. M., to meet at the Glenwood Inn for the taking of testimony.

At the hour of 8 o'clock P. M. on this 7th day of August, pursuant to the adjournment hereinbefore noted, the Master and counsel for the respective parties reassembled at the Glenwood Inn, and the following proceedings were had:

[Testimony of Arthur P. Knight, for Complainant.]

ARTHUR P. KNIGHT, produced as a witness on behalf of complainant, and being first duly sworn according to law, testified as follows:

Direct Examination.

(By Mr. LYON.)

Q. 1. You are the same Arthur P. Knight who has testified heretofore in this case on behalf of complainant, are you? A. Yes, sir.

Q. 2. Have you examined the grading machines now in use by the Riverside Heights Orange Growers' Association at its packing-house at Riverside, California? A. Yes, sir.

Q. 3. Have you ever seen in operation any of said machines other than at Riverside, California?

A. I have seen machines in operation similar to the

(Testimony of Arthur P. Knight.)

one type of machine at Riverside Heights packing-house.

Q. 4. Which type?

A. The type with the rolls of uniform diameter throughout, and provided with sticks or guides for limiting the outlet for the fruit.

Q. 5. And where did you see that construction of machine other than at the Riverside Heights Orange Growers' Association packing-house? [107]

A. At the packing-house of the Pasadena Orange Growers' Association at Pasadena, California.

Q. 6. And on how many occasions have you seen that machine? A. Twice.

Q. 7. You have referred also to a second type of grader now in use by the defendant Riverside Heights Orange Growers' Association. Wherein does that differ from the one just referred to by you?

A. The other type of grader at the Riverside Heights packing-house is provided with rollers which are tapered so as to be smaller at the upper end or the end nearer the feed end of the machine.

Q. 8. And how were these rollers arranged in such machine with respect to each other?

A. They were arranged end-to-end in each case.

Q. 9. And which end towards which end of adjacent rollers?

A. I supposed you refer to the machine with tapering rollers. In that machine the large end of each roller was arranged next to the small end of the adjacent roller.

Q. 10. And what means were employed or provided

(Testimony of Arthur P. Knight.)

in such machine for adjusting the height of the rollers toward or from the inclined carrier belt on which the oranges rested as they were carried along the series of rolls?

A. A bracket provided with an adjusting screw, the rotation of which served to vary the distance of the bearing of the rollers from the other member of the grading opening.

Q. 11. In such type of grader so used by the defendant Riverside Heights Orange Growers' Association, in which the tapering rollers are used, of what is the fruit runway composed?

A. The fruit runway is composed of a traveling belt, forming one edge of the grading opening, and a series of rollers mounted end [108] to end in substantial parallelism with the belt, but with the distances of the rollers from the belt graduated in successive rollers so as to form a gradual increase in width of the grading opening between the roller and the belt from the feed end toward the other end of the machine.

Q. 12. You are familiar with letters patent of the United States No. 997,468, granted to the defendant, George D. Parker, on June 11, 1911, and being Complainant's Exhibit Parker Patent in suit, and the construction of the grader therein shown and described? A. Yes, sir.

Q. 13. And you are familiar with the machines which the defendant has manufactured and sold substantially embodying the construction of said Complainant's Exhibit Parker Patent as referred to in

(Testimony of Arthur P. Knight.)

your former testimony in this case? A. Yes, sir.

Q. 14. In order to shorten your testimony, I will ask you to state what changes have been made in the machines thus manufactured and sold to the Riverside Heights Orange Growers' Association by the defendant George D. Parker under this Complainant's Exhibit Parker Patent, to comprise the two forms of the graders referred to by you this evening, directing your first attention to the changes, if any, that have been made in the belt-supporting devices and controlling device therefor, as they originally existed in the machines of Complainant's Exhibit Parker Patent.

Mr. ACKER.—To shorten the examination, I will admit that the new devices which are now referred to are the same in construction as the old one in suit, as far as related to the nonmovable guideway, the belt for propelling the fruit through the gradeway, but that it differs from the device held to be an infringement to the extent that the rollers constituting the outer member of the runway are not independent of each other and independently adjustable toward and from the fixed or nonmovable member, and the further fact that they are not independently rotatable, the [109] rotary wall member of the new device being placed on the market by Mr. Parker consisting of a plurality of connected rollers driven in unison from one end of the machine, and the rollers being mounted in bearings, the bearings supporting two adjacent ends of the rollers.

Mr. LYON.—In view of the statement of counsel,

(Testimony of Arthur P. Knight.)

all of which I cannot accept, I will ask the witness to state to what extent he agrees with or disagrees with the statement of counsel with respect to said machines.

A. The statement of counsel is correct in so far as it relates to the belt, and it is also correct in so far as it relates to the rollers being mounted and operated so as to rotate together. I do not find, however, that either of the machines at the Riverside Heights packing-house provides a construction which answers the definition of counsel when the principle of action of the same is considered. In both of these machines it is true that the adjustable mounting of the bearings support the adjacent ends of two adjacent rollers. But the construction of the rollers in the case of the tapered-roller machine, and the provision of the guides or sticks in the case of the other machine, is such that whatever adjustment may be effected for the upper roller of the two adjacent rollers within the limits of practical operation, is ineffective in controlling the sizing operation, and, therefore, the larger portion of the tapered roller in one machine or the portion of the roller in the other machine that extends over the stick or guide, corresponds to the idle space constituted by the overlapping sticks in the Parker patent. Therefore, in my opinion, the mode of operation of both these machines, namely, the tapered roller machine and the straight roller machine with the guides or sticks, is substantially the same as that of the [110] Parker patent in that it provides for limiting the outlet opening between

(Testimony of Arthur P. Knight.)

the roller and the traveling belt to a definite portion of the unit—that is, to the upper end portion thereof—thereby representing the same function in delivering the fruit of a certain size at a definite portion of the open space that is presented by the corresponding device in the Parker patent. I would therefore say that I consider, when the mode of operation of these machines is taken into account, that they present the independent adjustability of the different roller elements.

Q. 15. (By Mr. LYON.) You state that you consider that both these types, the type with the conical rollers and the type with the straight rollers and sticks, present the same or substantially the same mode of operation. What have you to say with respect to the substantial difference or substantial identity in the mode of performing the function and of grading and of securing individual adjustability of the grade openings.

A. I consider them substantially the same. In one case the limitation of the width of the grade opening is effected by the tapering roller so as to bring it down toward the belt. In the other case the limitation of the opening is provided by extending an obstruction, namely, the stick, upwardly from the surface, supporting the traveling belt, the function being the same in either case.

Q. 16. The defendant's contention, as you are aware, in the original hearing of this case was that the machine of the type of Complainant's Exhibit Parker Patent did not infringe claims Nos. 1 and 10

(Testimony of Arthur P. Knight.)

of the reissue patent in suit, for the reason that the overlapping guide arms did not form a continuous roller wall for the side of the fruit runway. What have you to say with relation to these two types of graders referred to by you, to wit, that [111] having the conical rollers and that having the straight rollers and sticks, with relation to this feature of the device of the Complainant's Exhibit Parker Patent?

Mr. ACKER.—I object to that question as assuming the defense which was made in the case. It is not a correct statement. The defendant in the suit referred to contended and contended strenuously that in the defendant's machine there was not embodied a series of end-to-end independently adjustable and independently power-driven rollers. The defense was not based as differentiating the defendant's device from the complainants solely on the ground that the overlapping arms did not constitute the runway of the complainant's patent. That was only one of the features involved in the defense. And I submit that the record in the case is the best evidence on that point, and the Master will draw his conclusion from the records.

Mr. LYON.—The question does not assume that I have stated all the points of defense, and I will ask the witness in answering this question to answer it as put, and then to answer it having in view the remarks of counsel for the defendant, and answer fully in regard to each of those.

The MASTER.—You may answer the question.

A. In so far as these sticks by their overlapping

(Testimony of Arthur P. Knight.)

and longitudinal adjustment provide for the longitudinal shifting of the grade units or sizer stands, the function of which was to shift the point of delivery of each sizer unit, for the purpose of convenience in delivery, to different bins, these two machines at the Riverside Heights packing-house do not present this special feature of the Parker patent. But in regard to the point of defense to which you refer, namely, that the provision of these overlapping sticks prevented the rollers from being end-to-end, and removed them from the principle or mode of operation of the Strain patent, I would say that the idle portion of each grader [112] unit in these two machines at the Riverside Heights packing-house, namely, the lower end portion of the tapered rollers, where the space left between the roller and the belt is too small to receive an orange of the size that will pass the larger space at the upper end of the roller, and the lower end portion of the straight rollers which extend over the obstructing stick or guide, also forming a contracted space which does not permit the passage of an orange of the size which would pass through the opening at the upper end portion of the same roller, corresponds identically in function and mode of operation to the idle portion of the runway formed by these overlapping sticks in the Parker patent.

In regard to the other points of definition that counsel referred to, I would say that these two machines present the end-to-end arrangement of the rollers in the same manner as in the Parker machine,

(Testimony of Arthur P. Knight.)

with the additional feature that they are even closer end-to-end than they are in the Parker patent, and the former machines constructed in accordance therewith. These two machines at the Riverside Heights packing-house also present the rotary action of the rollers, but the rollers in both cases are positively driven instead of being rotated by the fruit.

In regard to the independent adjustment of the rollers, I have already stated my opinion in the matter.

Q. 17. (By Mr. LYON.) Now, with respect to the mechanical rotation of the rollers in the two types of machines at the Riverside Heights Orange Growers' Association, referred to by you, to wit, that embodying the conical rollers and that embodying the straight rollers with sticks, how does the rotation of the rollers therein correspond or differ in function or effect from that of the Strain reissue patent in suit?

A. In the Strain reissue patent each roller is driven by a [113] separate belt from a common shaft. In the two machines at the Riverside Heights packing-house a series of end-to-end rollers are so connected end to end that they are all driven from the roller at the head end of the machine. The function in regard to rotation of the roller is the same in each case, since they all rotate together in either case.

Q. 18. You are familiar with the patent in suit, are you? A. The Strain reissue patent?

Q. 19. Yes. A. Yes.

Q. 20. And were examined with respect to the subject matter of both claims 1 and 10 in this case. Will

(Testimony of Arthur P. Knight.)

you please take each of said claims and, in accordance with your understanding thereof, state wherein the two machines at the Riverside Heights Orange Growers' Association to which you have just referred, correspond or differ in function, principle of operation or inter-relation of parts, from the combination of these respective claims as understood by you?

Mr. ACKER.—I object to that question as calling upon the witness to construe a claim. It has been repeatedly held that the construction of a claim is the province of the Court and not of the witness. He is an expert called to define the construction of the machine, and not to construe a claim. And in this particular case our Circuit Court of Appeals has construed the claims of the patent, and it is immaterial what this witness' idea may be or what his view as to the claims is.

Mr. LYON.—I believe the first objection is good, that it is not the province of expert witness to construe claims at any time. But I thought perhaps that you might yourself want to ask some questions in regard to some features, and therefore an explanation of the terms involved might be proper. Unless you [114] for your own purposes care for something of that kind, I do not care especially for it.

The MASTER.—The objection is sustained.

Mr. LYON.—You may take the witness, Mr. Acker.

(Testimony of Arthur P. Knight.)

Cross-examination.

(By Mr. ACKER.)

Q. 21. Would it be a fair statement that the rollers in the machine which you have just been testifying to at the Riverside Heights *Orange Association,* and also at the Pasadena packing-house which you have testified to, constitute a single roller throughout the length of the runway?

A. I don't think that would be a fair definition.

Q. 22. You have an affidavit, did you not, Mr. Knight, in connection with equity suit No. 92 pending in the United States District Court for the Southern District of California, entitled Fred Stebler vs. George D. Parker and the Pasadena Orange Growers' Association, such affidavit being for the purpose of a preliminary injunction in connection with the claim of infringement by Mr. Parker, through the use of this new device, of two separate patents which were not involved in the suit on which the present accounting is taken.

The MASTER.—Have you the affidavit?

Mr. ACKER.—I have, your Honor.

The MASTER.—You may show it to him.

(The affidavit is handed to the witness.)

A. Yes.

Q. (By Mr. ACKER.) In the affidavit which you have just examined and which you state you gave, I will ask you whether the two patents I now hand you are the two patents referred to in the said affidavit. **[115]**

Mr. LYON.—Objected to as irrelevant, imma-

(Testimony of Arthur P. Knight.)

terial and incompetent to the issues of this suit, and needlessly incumbering the record.

The MASTER.—Answer the question yes or no.

A. Yes.

Q. 23. (By Mr. ACKER.) In your comparison of the new machine of Mr. Parker with the patents to which your attention has just been called, you contended in your affidavit, did you not, that the new machine of Mr. Parker conformed to the machine of the Thomas Strain patent No. 775,015 of November 15, 1904, for fruit grader?

Mr. LYON.—Objected to as not cross-examination, irrelevant, immaterial, and upon the further ground that it appears that the patent referred to is a subsequent patent to the patent in suit, and can have no bearing upon the scope or interpretation to be placed upon claims 1 or 10 of the Strain reissue patent here in suit.

Mr. ACKER.—In reply to that objection, if your Honor please, I am not asking this witness to construe claims 1 and 10, or any construction based thereon, but I wish to show by the witness's own affidavit that his testimony in the affidavit was at variance with the testimony as now given.

Mr. LYON.—I wish to add to the objection that it is not the proper method of proof. The affidavit should be offered in evidence.

Mr. ACKER.—We will offer the affidavit in evidence in due time.

The MASTER.—The objection is sustained. The affidavit is the best evidence.

(Testimony of Arthur P. Knight.)

Mr. ACKER.—I will offer in evidence the affidavit given by Mr. Knight in connection with equity suit No. A–92 in the case of Fred Stebler vs. George D. Parker and Pasadena Orange Growers' Association, now pending in the United States District Court [116] for the Southern District of California, and the Bill of Complaint, filed in connection with said suit, and ask that the same be marked Defendant's Exhibit — —.

Mr. LYON.—We object to the Bill of Complaint on the ground that it is incompetent, irrelevant and immaterial and needlessly incumbering the record, no foundation laid, it not being shown that the machine to which such Bill of Complaint was directed was the machine referred to by the witness in his testimony here this evening, and this objection will be also offered to the affidavit.

The MASTER.—Is there any reason for introducing the complaint?

Mr. ACKER.—No; I don't want to separate the papers. The affidavit is all I want.

The MASTER.—The objection is sustained to the complaint, and the affidavit will be received.

Mr. LYON.—Note an exception. Let the affidavit be copied in the record at this point. That will save his tearing the papers apart.

The MASTER.—I don't know that the affidavit need be copied. It is on file in the court as part of the records of that case and can be considered as read in the testimony.

(Testimony of Arthur P. Knight.)

Q. 24. (By Mr. ACKER.) What did you mean in your affidavit, Mr. Knight, by the following expression, when making the comparison between the Parker new machine and the device of the Strain patent No. 775,015, which expression reads as follows: "Such means in defendant's machine comprise a series of wooden rollers, so mounted as to constitute a single roller for the length of the machine."

Mr. LYON.—The question is objected to on each of the grounds stated in the objection to the affidavit.

The MASTER.—I look at it as proper cross-examination as testing the witness as to his testimony here in reference to the description **[117]** of the machines in evidence.

Mr. LYON.—Of course, I want to reserve the objection and the exception for the simple reason—of a difference in the machines—

The MASTER.—It is not a question of the difference in the machines, but it goes to the question of his description of the machines that he has given here tonight.

Mr. LYON.—It is not the same machine that he referred to in the Pasadena Orange Growers' Association.

Mr. ACKER.—I contend that it is the same machine.

Mr. LYON.—Part of it is the same and part of it is not.

The MASTER.—The objection is overruled.

Mr. LYON.—Note an exception.

A. In the sense that all of these rollers are so

(Testimony of Arthur P. Knight.)

connected that they rotate together, as I have already stated, they constitute a single roller. In regard to the mode of operation of the Strain machine and the corresponding mode of operation of these machines in respect to the individual selection of different sizes, it cannot be fairly said to constitute a single roller in this respect.

Q. 25. (By Mr. ACKER.) In the Strain patent with which you were making your comparison, the rotating member of the grade runway consisted of a single rod extending the entire length of the runway, did it not?

Mr. LYON.—The same objection.

The MASTER.—The objection is overruled.

Mr. LYON.—Exception.

A. Yes.

Q. 26. (By Mr. ACKER.)—And that was a rotating rod, was it not, throughout the length of the machine?

Mr. LYON.—The same objection.

The MASTER.—Overruled.

Mr. LYON.—Exception. [118]

A. Yes, sir.

Q. 27. (By Mr. ACKER.) The purpose of this affidavit was to convince the Court that the new machine of Mr. Parker consisted, to all intents and purposes, of a single rotating structure, extending the entire length of the fruit runway, was it not?

Mr. LYON.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination and not the best evidence.

(Testimony of Arthur P. Knight.)

The MASTER.—The objection is sustained. You may answer the question subject to the objection. What the purpose is of the affidavit before the Court is immaterial in this matter, and for that reason I sustain the objection. The witness may answer subject to the objection.

A. The purpose of the affidavit or this portion of the affidavit was to show in regard to the mode of operation of the Strain patent referred to and the mode of operation of the alleged infringing machine referred to at that time, that these rollers had in the infringing machine the same function as the rod in the Strain patent.

Q. 28. (By Mr. ACKER.) Are not the rollers of the new grader of Mr. Parker and which you have examined to-day, connected one to the other, and mounted in their bearings in the same manner as the machine which you examined in giving the affidavit to which your attention has been directed?

A. I do not recall that alleged infringing machine sufficiently to swear to that.

Q. 29. Would a reading of your affidavit refresh your memory? A. It probably would.

Q. 30. I will ask you to examine the same.

A. As far as I can recollect and as far as my memory is refreshed by reading the affidavit, I would say they are the same.

Q. 31. Were not the rollers of the grader about which you gave the affidavit, and are not the rollers of the new graders **[119]** which you examined to-

(Testimony of Arthur P. Knight.)

day, connected one to the other in substantially the same manner as the rollers of the Ish patent, or what is known as the California sizer, were connected? You understand in my last question what is meant by the Ish patent, Mr. Knight? A. Yes.

Q. 32. I will ask you to answer the question with that understanding of the Ish patent.

Mr. LYON.—The question is objected to so far as it refers to the so-called California grader, on the ground that it is indefinite and uncertain as to what counsel means thereby. If he means the device of the Ish patent, that is one thing; and if he means a grader as he called at Rialto a "California grader," that is another thing.

Mr. ACKER.—I mean by the "California grader" that grader which was referred to in the testimony in the suit in which the present accounting is being directed, and as to which you testified in said suit.

A. In the Ish grader shown in the original patent there was really only one roller provided with a series of steps. But in the California grader there is, for example, at the Rialto packing-house—there are several rollers which are end-to-end, and which are connected to rotate together. In so far as this connection to rotate together is concerned, the construction of this California grader is similar to that of the two types of machines at the Riverside Heights packing-house.

Q. 33. Is it not a fact that in the California grader and equally so in the Parker new grader that all of

the rolls are arranged end to end and connected one to the other so that they are all driven in unison from power applied at one end of the machine?

Mr. LYON.—The question is objected to in so far as it refers to **[120]** such so-called California grader at the Rialto packing-house, on the ground that the same was not manufactured, known or used, or proven to be a part of the prior art, prior to the invention by Robert Strain of the subject matter of the patent here in suit, and all testimony with respect to such so-called California grader at the Rialto packing-house is objected to on the ground that it is incompetent, irrelevant and inadmissible at this time, upon the accounting, as the Master is to judge the question of prior art by the record in this case, and the matter of the prior art and the scope and validity of the Strain patent is *res ajudicata.*

Mr. ACKER.—In reply to that last objection, counsel seems to be laboring under the impression that I am endeavoring to prove a prior art to anticipate the patent under which this accounting is made. That is not the case. It is open to the defendant to show that he had a right to use any machine in the market prior to the time that he entered the field as an infringer. This California sizer which we examined to-day was a device in the market prior to the entry of the defendant in the field, and it is open to us to show to your Honor, and for your Honor to investigate and make full inquiries, as to what was open to the defendants to use.

The MASTER.—But if that was an infringement of the patent, why, then the defense fails, doesn't it?

(Testimony of Arthur P. Knight.)

Mr. ACKER.—If that is an infringement.

The MASTER.—And has not the decree in this case and the opinion of the Circuit Court of Appeals determined to what extent the prior art was in operation?

Mr. ACKER.—No, sir. The decision of the Court only determines the prior art to determine the want of invention. We are not inquiring into that. **[121]**

The MASTER.—No, but the decree of the Appellate Court goes into both questions.

Mr. ACKER.—It goes into the question of the prior art as set up in the case for the purpose of anticipation and noninfringement. Now, we are not attacking—

The MASTER.—But have not you had your day in court?

Mr. ACKER.—We are not attacking anything concerning the decree of the Court.

The MASTER.—But haven't you by your previous case had your day in court? And if you had as a defense that there was a California grader in use that you might have copied or used, that you should have set up in the case as a defense and not bring it in now?

Mr. ACKER.—What is now set up as a device being in use is the same device as was referred to by the Court—the California sizer. We are showing the form of the California sizer that was in use and which the defendant could have made use of and which any of the public might make use of it

(Testimony of Arthur P. Knight.)

at this time. We are not going on the question of infringement.

Mr. LYON.—That is what we are going on now. And I will state this for the information of the Master: that we will accept the amended statement of the Riverside Heights Orange Growers' Association that it has made no new profits in the use of the infringing machines up to the date of the interlocutory decree, so that the question of profits as against the defendant Riverside Heights Orange Growers' Association is eliminated from the case.

The MASTER.—I think I will sustain the objection. It seems to me as though all of those questions were covered in the preliminary trial.

Mr. ACKER.—An exception is noted. **[122]**

The MASTER.—You may answer the question subject to the objection.

Mr. LYON.—If you include the type at Rialto, you go into something that was subsequent and not before, and you cannot introduce more prior art.

The MASTER.—He is not trying to introduce prior art. His answer is now that these new devices that he has correspond with the Ish patent and not with the Strain patent, and that therefore he has a right to use them.

Mr. LYON.—Then he must not take some construction that has been made four years subsequent to this invention and which is not shown ever to have existed prior to this invention, and attempt to plead a prior art which he has not shown even existed.

(Testimony of Arthur P. Knight.)

The MASTER.—But suppose that California grader was built under the Ish patent and was exactly like it, and he shows it, and then he shows that his device here is exactly like the Ish patent?

Mr. ACKER.—We have shown your Honor today that this device was licensed under this patent.

The MASTER.—I understand. But isn't that part of your defense and not part of your examination of this witness?

Mr. ACKER.—But your Honor, they are now injecting into this examination a new phase of infringement.

The MASTER.—An infringement of their patent.

Mr. ACKER.—And now my answer is that we have gone back in the art and that we are constructing a device of the art as it existed when we came into the field.

The MASTER.—But isn't that part of your case and not cross-examination of this witness?

Mr. ACKER.—I have a right to show by this witness, as he has been cross-examined as to the record of the main case, and his **[123]** familiarity with the devices which he testified to in the main case. I certainly have a right to cross-examine on what counsel brought out himself. He brought out this record.

The MASTER.—But he did not bring out the record of that grader—that Rialto grader—in his direct examination.

Mr. ACKER.—I thought we would shorten the examination.

(Testimony of Arthur P. Knight.)

The MASTER.—Don't you have to confine yourself now under the new rules the same as in a hearing before the Court?

Mr. ACKER.—We can put it in with our own witness.

The MASTER.—The objection is sustained.

Q. 34. (By Mr. ACKER.) In a previous question, Mr. Knight, I asked you whether the rolls of the new grader of Parker might not be treated as *on* continuous roll, and your answer was no. In your affidavit you have referred to it as a continuous roll. Please explain the apparent conflict.

A. There is a discrepancy, but it is only apparent due to the fact that the device is viewed from two different angles. In one case it is being considered with reference to its similarity or dissimilarity to the Thomas Strain patent in which the independent transverse adjustment of the different rolls was the essential feature. In the other case it was being considered with reference to the delivering means, and in which the construction of the rolls was only broadly introduced, and the provision for independent adjustment was of no special bearing.

Q. 35. In the rolls of the new Parker grader as at present installed, does not the rotating member of the fruit runway comprise a member rotating in unison from one end of the grade-way to the other, or throughout the length of the grade-way?

A. Yes.

Q. 36. And that held true with the Strain patent

to which your affidavit was directed, did it not? **[124]**

A. Yes.

Q. 37. Does that hold true as to the construction of the rotating form of the wall member of the fruit runway of the Strain reissue patent to which the present accounting is directed?

A. I consider that it does substantially, so far as rotation. They rotate together by the action of the belt.

Q. 38. Isn't each roller driven independently of the others?

A. The drive is independent only in the sense that it is performed by a separate member, namely, the different belt. But there is no independence of action, inasmuch as if one rotates they all rotate, and they rotate together and stop together.

Q. 39. In the device of the Strain reissue patent the rollers are rotated irrespective of the small counter belt which supplies power?

A. Yes, sir; if the belt is taken off the rollers would rotate when the fruit is passing.

Q. 40. That is, they rotate by the frictional contact of the fruit? A. Yes, sir.

Q. 41. Is that true of the rollers of the new Parker grader?

A. You mean to ask whether they would rotate if the power was taken off?

Q. 42. Yes.

A. I cannot answer that. The other I answered

(Testimony of Arthur P. Knight.)

because I saw it by reason of the fact that it was in operation.

Q. 43. Your familiarity with the new Parker sizer as to which you have been testifying is not sufficient to enable you to state what the action would be if the power was taken off of the rollers? Is that correct?

Mr. LYON.—Objected to as irrelevant, immaterial and incompetent, inasmuch as it is alleged that the rolls in the two new Parker **[125]** constructions are rotating rolls and are power-driven rolls, and in this respect do differ from the device of Complainant's Exhibit Parker Patent, and correspond in mechanical drive to the mechanical rotation of the rolls in the reissue patent in suit.

The Master.—The objection is overruled. The objection is simply argumentative.

Mr. LYON.—Exception.

A. Do you mean so that there is no connection between the rollers and the driving means? I would have to know that before I could answer the question.

Q. 44. (By Mr. ACKER.) If a breakage took place between the transmitting gears for imparting power to the drive shaft or to the shaft on which the forward or drive roll is mounted, would the rollers rotate by fruit being passed through the runway through frictional contact?

A. If the break was at the gear on the roller shaft itself, so that the shaft is left comparatively free,

(Testimony of Arthur P. Knight.)
then it seems to me that the rollers might be rotated if enough fruit is in contact with the rollers and belt at any one time with sufficient friction.

Q. 45. Would that hold true as to the California sizer under the same conditions?

A. I should think so.

Q. 46. Did you not in your testimony in the suit in which the present accounting is taken testify that in the California sizer the rollers would not rotate by frictional contact of the fruit passing there through?

Mr. LYON.—Objected to on the ground that the witness is entitled to have the portion of the testimony referred to by counsel, if there be such testimony, called to his attention. The testimony of the witness is in the case and it is the best evidence of what he testified to. **[126]**

The MASTER.—I think he is entitled to the testimony.

Q. 47. (By Mr. ACKER.) I will get at it in another way. What would you have to say regarding the Parker sizers which you examined to-day in the Riverside Heights Orange Growers' Association packing-house, if the power which drives the belt were removed, so far as relates to those rollers, and when I say "the rollers," I mean the whole series of rollers rotating for practical working purposes, by the frictional contact of fruit passing through the fruit runway.

A. At the rate at which the fruit ordinarily comes down the runway, I do not think if the power were

(Testimony of Arthur P. Knight.)

removed there would be enough rotation—that there would be any considerable amount of rotation.

Mr. ACKER.—At this time I will offer in evidence the two patents referred to in the affidavit of Mr. Knight, and ask that the same be marked Defendant's Exhibits 6 and 7.

Mr. LYON.—Objected to as irrelevant, incompetent, not cross-examination, and needlessly incumbering the record.

The MASTER.—I am going to admit them as the affidavit was admitted, as referred to in it and partly explanatory of it.

Mr. LYON.—And it will be considered that they are objected to on the same ground as the affidavit was objected to?

The MASTER.—Yes.

Mr. ACKER.—In view of your Honor's ruling that the California sizer would more properly come from my own witnesses, I will discontinue the cross-examination of this witness.

(The two patents, offered in evidence are marked as requested by counsel.) [127]

Redirect Examination.

(By Mr. LYON.)

Q. 48. You have been asked certain questions in regard to this affidavit, Mr. Knight. What bearing, if any, had the mode of operation of the device of the Thomas Strain patent No. 775,015 upon the comparison of the Pasadena Orange Growers' Association machine as it existed at the time of making said affidavit, with the statements therein concerned, if any,

(Testimony of Arthur P. Knight.)

giving particular attention to the portion referred to by counsel on cross-examination.

A. If you refer to the mode of operation of the rotatable rod in the Thomas Strain patent, and the rotating rolls in the Pasadena Orange Growers' Association machine, the specific construction of these elements had no bearing on the general features referred to in said affidavit.

Q. 49. You made an examination of such machine as it existed at the Pasadena Orange Growers' Association prior to the making of this affidavit?

A. Yes.

Q. 50. How were the grading outlets of said machine controlled in such Pasadena Orange Growers' Association machine at the time of your first examination thereof? And when I say "controlled," I mean varied or adjusted.

Mr. ACKER.—Owing to the lapse of time that has intervened from the making of the affidavit to the present time, I submit that the affidavit itself which correctly sets forth the construction of the device, is the best evidence on that point.

The MASTER.—The objection is overruled.

A. I take it that you refer to the lateral adjustment—that is, the transverse adjustment—which, to my recollection, is effected by screws.

Q. 51. (By Mr. LYON.) Calling your attention to the Strain patent [128] and to the feature of raising the levers 13 by moving the wedges 16 in or out by manipulation of the lever 17, at the time of making this affidavit did such Pasadena Orange

(Testimony of Arthur P. Knight.)

Growers' Association machine contain devices for this purpose operating in any such manner?

A. I cannot recall them.

Q. 52. To refresh your recollection, you made a subsequent examination of this Pasadena machine and found that certain portions of the wooden frame on which the belt runs had been sawed and had been nailed in place, and the adjusting screws of what might be termed trap-door effects had been removed.

Mr. ACKER.—Objected to as extremely leading.

The MASTER.—The objection is overruled.

A. Yes; I now recollect it.

Q. 53. (By Mr. LYON.) What were these trap-door-like portions of such runway in said Pasadena machine originally arranged for?

A. They determined the position of the outlet opening for the fruit. The adjustment of these trap-doors served to adjust the width of the opening.

Q. 54. And what changes, on examining this Pasadena Orange Growers' Association machine the second time, did you observe with reference to the manner of securing such individual adjustment of these grade openings?

A. As far as my examination of the machine showed, the adjustment of the grade openings is made now by screws similar to that of the straight roller machine in the Riverside Heights packing-house.

Q. 55. And contained also the strips under the rollers in blocking out a portion thereof?

A. Yes, sir.

(Testimony of Arthur P. Knight.)

Mr. LYON.—That is all. [129]

The MASTER.—Is the signature of the witness waived?

Mr. ACKER.—Yes. I understood that to be the case.

Mr. LYON.—Yes.

(An adjournment is now taken until to-morrow, August 8, 1914, at 9 o'clock A. M., at the same place.) [130]

[Proceedings Had August 8, 1914, 9 A. M.]

Glenwood Inn, Riverside, Cal.,

August 8, 1914, 9 o'clock A. M.

This being the time to which the further taking of proof in this matter was continued proceedings are now resumed.

Present: Hon. LYNN HELM, Special Master.

FREDERICK S. LYON, Esq., Solicitor for Complainant.

N. A. ACKER, Esq., Solicitor for Defendant.

[Testimony of Fred Stebler, for Complainant (Recalled).]

FRED STEBLER, recalled on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. LYON.)

Q. 97. When did you first see the grader or graders being installed in the Pasadena Orange Growers' Association packing-house at Pasadena by the defendant George D. Parker?

(Testimony of Fred Stebler.)

A. I think in either August or September last year.

Q. 98. With relation to the control of the size of the grade openings how at that time was such machine constructed?

A. Their control of the grade openings at that time, as the construction showed, was by means of adjustable trap-doors beneath the traveling belt.

Q. 99. And you thereupon brought suit against Mr. Parker and the Pasadena Orange Growers' Association on the Thomas Strain patent No. 775,015, did you? A. Yes.

Q. 100. What was done by Mr. Parker with respect to such machines immediately upon the bringing of such suit?

A. The construction of them were changed with reference to the adjustment of the grade openings. **[131]**

Q. 101. In what respect and how?

A. The adjustments were taken off the trap-doors just before mentioned, and the doors themselves were nailed fast in a fixed position, and an adjustment was provided for the roller or rotating member of the grade-way.

Q. 102. What adjustment?

A. By means of adjusting screws by which the gradeway or the aperture in the gradeway could be varied by raising or lowering the roller.

Q. 103. What kind of a roller side did such graders at such Pasadena Orange Growers' packing-house have?

(Testimony of Fred Stebler.)

A. They had straight rollers. That is rollers of uniform diameters from end to end.

Q. 104. And in what way was the adjustment of the several grade openings secured? Coincident, or for the length of the entire roller set, or independently? I mean after the removal of the trap-door arrangement and the provision of the other adjusting device.

A. The adjustments were provided at the grade opening.

Q. 105. You have seen the two machines to which the Master's attention was called yesterday at the Riverside Heights Orange Growers' Association in which the conical rolls are used in one, and the rolls of the same diameter throughout in the other, have you? A. Yes.

Q. 106. And in the latter of these machines you have directed attention to the sticks or filler pieces, have you? A. Yes, sir.

Q. 107. In this machine in the Pasadena Orange Growers' Association packing-house, after the removal of the trap-doors, were any such filler stick devices used therein?

A. They were put on later; yes. [132]

Q. 108. What was the purpose of those devices in both of the machines, to wit, the machine of the Pasadena Orange Growers' packing-house and the machine at the Riverside Heights packing-house?

A. Apparently to close up the large end of the grade opening for about three-quarters of its length,

(Testimony of Fred Stebler.)

so that no fruit could pass through the grade opening at that point.

Q. 109. You have observed both of these machines in actual operation on different occasions?

A. Yes.

Q. 110. And understand the operation thereof?

A. Yes, sir.

Q. 111. Please explain to us the method of such operation, and also the mode of securing the adjustment of the grade openings, and at such time, state what effect the adjustment of one grade opening has upon the adjustment of the grade opening or openings, if any.

A. The general operation of these machines is similar with all machines of that character, in that the fruit is introduced at one end and carried along the machine on the gradeways by the traveling belt until it comes to such point as the aperture of the gradeway between the traveling belt, and the roller is large enough to allow the fruit, or certain fruits, to pass through; it being understood, of course, that the fruits come to the machine varying in size, and the function of the machine is to separate these sizes, which is done by carrying them along this gradeway and rotating them between the traveling belt and the roller, and until they come to such point in the gradeway as the aperture will allow them to pass through. Such is the general function of all machines of this character. In these particular machines referred to, as originally built with the straight rollers, [133] as in the case of the Pasadena Orange

(Testimony of Fred Stebler.)

Growers' Association, in order to obtain a grading aperture of increasing width, it is necessary to run the rollers on an incline, you might say, or the axis of the rollers on an incline to the traveling belt, the result of which is to give a constantly increasing grade opening not only the entire length of the machine, but the length of each section of roller. And, as a consequence, the fruit would not come out at any one given point, but would come out all along the length of each section of the roller, by reason of the constant increase of the width of the aperture. This condition deteriorates from the function required of the machine,—I should say the result required from the machine,—in that the sizes are mixed. In other words, a given size for each bin would contain mixed sizes, in this way: that in one end of the bin, or the end next to the intake or small end of the aperture, the fruit would be smaller than it would be at the farther end. This is highly objectionable for the reason that very often it is desirable to put two packers on these bins, one packer not being able to take care of the fruit as fast as it comes. In that case the result we get is that in the end of the bin having the small size fruit, the boxes in that are finally filled up by the packer and would not be full enough, although containing the required number of fruits. While on the other hand, the box of the other packer working on that bin, although containing the same number of fruits, would be too full. This condition is not permissible. Therefore, in order to remedy this, it was necessary to close up the

(Testimony of Fred Stebler.)

greater portion of the large end of this grading aperture and allow the fruit to be taken out only at one point. This was done in the case of the Pasadena Orange Growers' Association and in the case of the first two machines that were changed over in the packing-house of the Riverside Heights Association last year, by inserting [134] the fixed stick in the aperture of this gradeway, with the result, as I have before stated, that the fruit would then come out only at the small end of the aperture, or a portion of the section of the roller for that bin. In the case of the later two machines changed over in the packing-house of the Riverside Heights Association, this was accomplished by increasing the diameter of the roller at the large end of the aperture enough so that the fruit could not pass through the grade aperture at this point when in normal adjustment, which had the same effect as the fixed stick, just above referred to, placed in the grading aperture. Not only did this arrangement eliminate the objections just above referred to of mixed sizes in the bins at the different ends, but it also enables the operator of these machines to control his sizes independently of each other within adequate limits, in this wise: that if it is found, as is often the case, that in adjacent sizes in the bins one of them is packing a little bit too large, or filling the box too full, it is only necessary to close the grading aperture at this point very slightly in order to remedy this. This is a highly desirable function and without it modern grading machines

(Testimony of Fred Stebler.)

could not be a success. I believe that answers the question.

Q. 112. What then, Mr. Stebler, have you to say with reference to both these two types of machines, the one at the Pasadena Orange Growers' Association, and the similar one at the Riverside Heights Orange Growers' Association, and the conical roller machine at the Riverside Heights Orange Growers' Association, as to the adjustment of the rolls toward and away from the belt to secure an independent or individual adjustment of the several grade openings with respect to such adjustment affecting the size of fruit discharge through or by means of the adjoining roller portion either just preceding or just succeeding such portion adjusted? And in answering this question, compare such effect [135] and result and the general method of securing such result with the same result and method of securing the result in the machine of the Strain reissue patent in suit, and, at the same time, compare the same with the same matter in the infringing machines of the type of the complainant's Exhibit Parker Patent.

Mr. ACKER.—I object to that portion asking the witness to make a comparison between the new Parker machine and the Parker machine of the patent held to be an infringement. So far as the comparisons called for as between the devices of the patent in suit, there is no objection one way or the other.

The MASTER.—The objection is overruled.

Mr. ACKER.—An exception is noted.

A. In the two types of the new Parker machines at

(Testimony of Fred Stebler.)

the Riverside packing-house, I have just pointed out in my answer to the previous question that it is possible for the present arrangement to control the adjacent size of fruit in the corresponding adjacent bins independently enough for all practical purposes; and I have pointed out how it was accomplished or how it was done; and I can only say farther that it is possible in either of these machines to so control those adjacent sizes, either preceding or succeeding, independently enough for all practical purposes. Of course, I do not mean to be understood as saying that any one individual size can be opened or closed to the extent of the full variation of one size or more, without affecting the adjacent sizes, for the reason that there is no provision made in these machines for taking care of these sizes in this manner in the bins without mixing them. But this is seldom desired, and I think not at all desired in this instance. But what is desired and must be had, is means to so adjust each individual size as to make it pack properly in its individual box. For instance, in the 150 size there are supposed to be 150 oranges in that box, and when that box is packed it is [136] supposed to be just so full and neither more nor less. The next adjacent larger size, I believe, would be 126, which must be packed likewise. Now, then, if it should be found that the 150 size was not filling the box sufficiently, then the operator would open that grading aperture very slightly but just enough so that enough fruits of increasing size would go into that bin to make that box come up finally to

(Testimony of Fred Stebler.)

where they wanted it. And this can be done without any question on these new types of machines as in the Riverside Heights Association and in the Pasadena Orange Growers' Association, and when this is done it is all that is required. Strain, of course, in his reissue patent was striving for this very thing, and he did it by adjusting his roller sections independently. Mr. Parker in his patent, as disclosed in Complainant's Exhibit Parker Patent, was striving for the same thing, knowing, of course, that his machine would have no value without it. Of course, his rollers were shorter than Strain's, and, therefore, he had a nongrading space, sometimes called in this case "idle space." He utilized this as a means for adjusting his grading apertures endwise of the machine, which was an added function but did not detract from the other function just before mentioned of controlling the sizes independently, and his idle space was in this case closed with a stick, or, I should say, two sticks overlapping, to permit the apertures being adjusted to and from each other. The fact of their being overlapping, however, had nothing to do with their functions so far as the grading apertures were concerned. Apparently, then, when he undertook to remodel or reconstruct this machine after it had been declared an infringement of the Strain reissue patent, he thought at first to abandon this nongrading or idle space for, as the machines were first constructed, there was grading space the entire length of the roller. But finding that the machine could not be a success [137]

(Testimony of Fred Stebler.)

constructed in this manner, for the reasons that I have previously pointed out, then the stick was again adopted closing or blocking out a portion of this grading space as in his prior machine and still in use. And, as I have before stated, while the stick was not used in all cases, its equivalent was used in the conical roller or by making the grading roller, or a portion of it, of such increased diameter as to close the grading aperture or a large portion of it in such manner as to make a large portion of each grading aperture idle or nongrading space. In this respect, then, it was practically equivalent to his first type of machine, which has been declared an infrinement of the Strain reissue patent.

Q. 113. Directing now your attention, Mr. Stebler, to the question of the rotation of the rolls in these two new types of machines at the Riverside Heights Orange Growers' Association, what have you to say as compared with the device of the Strain reissue patent of the manner of rotating the roller set of such graders?

A. Well, in each case the rollers are now power driven, and they rotate in the same way with respect to the traveling belt, the only difference being that in the Strain reissue patent each section of the roller is driven from a common shaft by means of a belt, whereas in the new type of Parker grader, as used in the Riverside Heights packing-house, the rollers are driven all from one end. But the effect is practically the same for the reason that in both the Strain reissue patent and this new Parker ma-

chine the rollers are driven continuously and in unison. That is, I mean to say by "in unison," that in the Strain grader each section of the roller making up the gradeway is continuously driven, and each section of the roller in the new Parker grader is continuously driven.

Q. 114. Does the manner of driving the roller side of these new Parker graders differ in function or effect in any manner from **[138]** the manner of driving of the roller side of the grader in the Strain reissue patent, and, if so, state in what.

A. No, sir; not so far as the function of the roller is concerned with respect to grading the fruit.

Q. 115. You originally manufactured the California grader under the Ish patent, did you?

A. We have made a very few of those machines.

Q. 116. What sizes or lengths?

A. Usually in what is called the double grader, but never more than 12 feet long.

Q. 117. And how was the roller side constructed?

A. The roller side was constructed of a graduated roller, or a roller diminishing in diameter from the feed end toward the discharge end of the grader, and this roller was usually built in the 12-foot machine in three sections, each section having from two to four different diameters, making a corresponding number of increased grading apertures.

Q. 118. In any of such machines was there any possibility of securing independent or individual adjustment of the grading apertures?

A. None whatever.

(Testimony of Fred Stebler.)

Q. 119. Your attention was directed to a certain machine yesterday at Rialto, the said machine being against the west wall of the packing-house where we visited such packing-house at Rialto. What have you to say with respect to the time when such machine was built and constructed, and with respect to the possibility of securing independent or individual adjustment of the different grades by such construction?

A. To the best of my recollection that machine was built by themselves either in the latter part of 1904 or early in 1905, but at no time to my knowledge has it ever been possible to secure **[139]** anything like an independent adjustment of any adjacent sizes on that machine, although for each size they have a separate section of roller. That is to say, to distinguish between my description of the machines as I build them with more than one section or grade opening to each section of roller, they had and still have one section of roller for each size or each grading aperture. Yet with this I cannot see how it is possible for them to materially adjust one size or attempt to regulate or control one size in that machine without materially affecting the adjacent size, for the reason that in that case the rollers are not of a uniform diameter the length of the machine, but still a stepped or graduated roller, which construction gives them a practically parallel grade aperture. What I mean by "parallel grading aperture," is that the grading aperture is practi-

cally of a uniform width at each end of the roller for any given aperture. With this construction then they eliminate to a considerable degree the objection of getting two sizes in any given bin. This result comes more particularly and pronouncedly in a diverging or increasing grading aperture, which they have not got. But they do get, however, with the parallel or grading aperture of uniform width, the size of fruit coming out practically the whole length of this grading aperture. Of course, this grading aperture being stepped, or increasing abruptly, they get the largest per cent in any given grade at the end of the aperture next to the intake, which has the effect of filling the bin in that end first. But they do get some fruit through this aperture its entire length and eventually if the bin is filled they can use two packers on any given bin without meeting the objections referred to of having one box too full and another box not full enough.

Q. 120. Prior to the purchase by you in 1902 of Thomas Strain's invention covered by reissue patent in suit, had you ever seen **[140]** or heard of such construction of grader as illustrated in this machine at the Rialto packing-house?

A. No, sir.

Q. 121. At the time that the machine at the Rialto packing-house was built by said company, what type of grader was your firm manufacturing?

A. Principally the machine shown in the Strain

(Testimony of Fred Stebler.)

reissue patent. We may have been making at that time now and then a California grader, but as the Strain machine came to be known, no one cared for the California grader.

Q. 122. You were manufacturing such Strain machines under both the Strain reissue patent and the Ish patent, were you?

A. Yes, sir; and we so marked them.

Q. 123. Again referring to the two types of machines examined by the Special Master and ourselves yesterday at the Riverside Heights Orange Growers' Association, at which point of the individual roller sections was the fruit discharge or the grading aperture formed?

A. In the case of the machine with the straight or uniform diameter roller, the grading aperture was at the small end of the aperture or the end next the intake. In the case of the machine with the conical roller, it was at the large end of the aperture or the same end next to the intake. In either case this was the only aperture or point of egress the fruit had.

Q. 124. What did the balance of the runway formed by the other portions of the roll and the belt perform?

A. It performed only a carrying or nongrading space.

Q. 125. And in this respect, corresponding to that portion of the machine of the Complainant's Exhibit Parker Patent, formed **[141]** by the overlapping guide arms?

(Testimony of Fred Stebler.)

A. Exactly so, so far as the nongrading space is concerned.

Q. 126. And so far as any grading effect is concerned.

Mr. LYON.—I think that is all.

Cross-examination.

(By Mr. ACKER.)

Q. 127. The California grader which we examined yesterday at the Rialto packing-house was a licensed grader under the Ish patent and the license granted by you, was it not? A. I think so.

Q. 128. What license fee was paid to you by the Rialto Company for the use of that California grader?

A. I think they had two machines of that character at that time, and they paid me $25 each or $50 for the two.

Q. 129. That is, a $25 license fee for each machine?

A. Yes, sir.

Q. 130. Please state in what lengths the California sizers were built as used in this market in the various packing-houses.

A. Prior to that time most of them were only 8 feet, and I think subsequent to the advent of the Strain grader they were made 12 feet.

Q. 131. Were they ever made 34 feet?

A. Not prior to the advent of the Strain patent.

Q. 132. At any time prior to the decree?

A. Well, this is one instance where they were made longer.

(Testimony of Fred Stebler.)

Q. 133. How many other instances?

A. I don't know. I never made any other.

Q. 134. Not as to yourself, but as used by the packers in the various packing-houses. **[142]**

A. I cannot answer for all of them. I recall one instance where there is a machine still in use in Orange of a similar character to the one that we saw at Rialto yesterday.

Q. 135. You placed on the market, as I understand from your testimony, the California sizer consisting of a plurality of rollers connected end to end and driven in unison, did you not?

A. No, sir; not other than I have just heretofore testified to.

Q. 136. I say, according to your testimony there was a plurality of rollers connected and in unison—

Q. Well, I don't know as I care to express it as a plurality. I did say we had a roller in three sections.

Q. 137. That is, you made one size with the runway consisting of a rotating member divided into three sections, and each section connected to the end of the adjacent rollers or sections.

A. That is true.

Q. 138. Did that not comprise, then a rotating way or member consisting of a plurality of roller sections?

A. Well, you may think so, and it may be true. I don't know that I would care to go on record and so state positively.

Q. 139. Didn't the California grader as placed on

(Testimony of Fred Stebler.)

the market by you comprise a grader one member of which consisted of a rotating structure composed of a plurality of units connected one to the other so as to be driven in unison?

Mr. LYON.—We object to the question as not cross-examination and as entirely threshed out in the previous hearing of this case and not an open question at this time.

The MASTER.—The objection is overruled.

Mr. LYON.—Exception.

A. Well, that is the same question as the previous one, in a different form, using the word "plurality."

Q. 140. (By Mr. ACKER.) You have in your possession, have you not **[143]** an exhibit which was introduced in this case in the hearing before his Honor, Judge Wellborn, and likewise used in the Circuit Court of Appeals, disclosing a California grader composed of more than one section?

A. Yes, sir.

Q. 141. I will ask you to produce that exhibit so that His Honor may fully understand that.

A. I will. I can have it brought down here in twenty minutes.

Q. 142. What difference in function or effect exists in the manner of driving the rotating wall member of the California grader, as examined by you yesterday at Rialto, and in the driving of the rolls of the New Parker grader, as examined by you yesterday at the Riverside Heights Orange Growers' Association packing-house, and likewise as ex-

(Testimony of Fred Stebler.)

amined by you at the Pasadena packing-house as testified to? A. No material difference.

Q. 143. In each case they are driven in the same manner? A. Practically so.

Q. 144. What do you mean by "practicallly so"?

A. Well, let it be understood first of all that in neither case have I disconnected these members or dismembered them to look into the details to see how they are driven or connected together.

Q. 145. Your examination of the Parker device, so far as relates to the drive mechanism, or how the rollers were operated, was coextensive with your examination into the device for the other purposes in the case?

A. What I mean to say is that my examination has only been cursory and not in detail. Apparently, though, they are driven from one end.

Q. 146. Your knowledge of these devices and the manner in which they operate is sufficient for you to state positively from your **[144]** examination of the machines yesterday, is it not?

A. I don't quite get the drift of your inquiry. Please read the question again. As I understand you, your question calls for a detailed answer.

Q. 147. No. I have no desire for you to go into the details of the mechanism.

A. I have stated that in each case the rollers appear to be driven all from one end.

Q. 148. Is it not a fact that the new Parker machine differs from the machine of the Strain patent to the extent that in the Strain device the

(Testimony of Fred Stebler.)

rollers of the gradeway are absolutely and independently adjustable with relation to each other whereas in the Parker device such independent adjustability is not practicable?

A. Yes; taking the rollers in the broad sense, that is true. But in the results accomplished by the two machines in comparison, it is not true.

Q. 149. Please examine the document which I now hand you, and state whether that is you signature. A. It appears to be; yes, sir.

Q. 150. Was that letter written by you to the Villa Park Orchard Association?

A. It appears to be.

Q. 151. And what machine had you reference to in connection with that letter when referring to the Parker machine?

A. I will read it and see. (After examining letter.) Well, I had reference to machines in general, and, of course, to the grader in particular.

Q. 152. You mean the new grader of Mr. Parker in particular? A. Apparently so.

Q. 153. In that letter you refer to a suit pending against Mr. Parker. Had you reference by the mention of this suit in said **[145]** letter to Equity Suit No. A–92 then pending in the District Court of the United States for the Southern District of California, entitled Fred Stebler vs. George D. Parker and Pasadena Orange Growers' Association?

A. I do not find where any mention is made with reference to any in suit in particular. It does not

(Testimony of Fred Stebler.)

say here "I suppose you are aware of the fact that the machines Mr. Parker is building are in controversy." That is all the reference I find to any suit. Without reading the letter through, I do not find any such reference.

Q. 154. Had you any other suit against Mr. Parker and undetermined on March 11, 1914, than Equity Suit A–92, relating to infringement of grader patents?

Mr. LYON.—Objected to as calling for a conclusion of the witness, unless you define what you mean by the term "undetermined." I will have to insist on the objection that it is not the best evidence.

The MASTER.—The objection is sustained.

Q. 155. (By Mr. ACKER.) I will modify the question to the extent of substituting for the word "undetermined" the word "undecided."

Mr. LYON.—That is subject to the same objection.

The MASTER.—The objection is sustained.

Q. 156. (By Mr. ACKER.) What undecided suit had you pending in the United States District Court for infringement of grader patents that had not been decided, other than Equity Suit No. A–92?

Mr. LYON.—The same objection. I am willing to state what suits were pending against Mr. Parker on the record here, for convenience, if you wish it. But this witness should not be asked to give his conclusion as to whether a suit is decided or is not decided.

(Testimony of Fred Stebler.)

The MASTER.—The objection is sustained. I think that you can prove what suits were pending.

Q. 157. (By Mr. ACKER.) What suits were pending at the time of the **[146]** writing of this letter of March 11, 1914, brought by yourself against Mr. Parker for infringement of the grader patents?

A. This present hearing and the suit on the Thomas Strain patent.

Mr. LYON.—And one under injunction, No. A–90. One suit is brought against George D. Parker. That is included in that list of suits.

Mr. ACKER.—I have no knowledge of that.

Mr. LYON.—You will find it in the list.

Mr. ACKER.—I offer this letter in evidence and ask that it be marked Defendant's Exhibit No. 8.

(Said letter so offered in evidence is marked as requested.)

Q. 158. (By Mr. ACKER.) Mr. Stebler I will ask you to examine Defendant's Exhibit 7 and state whether or not the patented device therein disclosed is incorporated in the machine as placed on the market by you at this time.

Mr. LYON.—Objected to as not cross-examination.

The MASTER.—The objection is overruled.

Mr. LYON.—Exception.

A. It is.

Q. 159. (By Mr. ACKER.) Please state, Mr. Stebler, what features of the Strain grader were old and on the market at the date of said patent,

(Testimony of Fred Stebler.)

with the exception of the rotating wall member of the said grader.

Mr. LYON.—We object to that on the ground that it is *res adjudicata* in this case and not cross-examination and incompetent.

Mr. ACKER.—Not *res adjudicata* so far as relates to what was old in the grader business. It is *res adjudicata* so far as relates to the invention of the claims involved in suit.

The MASTER.—The objection is sustained. **[147]**

Mr. ACKER.—An exception is noted.

Q. 160. Please state whether the fixed or nonmovable member of the grader runway of the Strain patent in suit was in use in fruit graders prior to the date of the Strain patent.

Mr. LYON.—The same objection.

The MASTER.—The same ruling. Answer the question subject to the objection.

Mr. ACKER.—Note an exception.

A. It was.

Q. 161. Was that fixed or nonmovable member of the grade runway a grooved one?

Mr. LYON.—The same objection, and the further objection that it has been fully gone over in the record and it is admitted that that particular element was old.

The MASTER.—The same ruling.

Mr. ACKER.—An exception is noted.

The MASTER.—Answer the question subject to the objection.

(Testimony of Fred Stebler.)

A. It was usually grooved.

Q. 162. (By Mr. ACKER.) How does the propelling medium of the Strain reissue patent in suit compare with the propelling medium employed in the fruit runway of the prior graders?

Mr. LYON.—The same objection.

The MASTER.—The same ruling.

Mr. ACKER.—An exception is noted.

The MASTER.—Answer the question subject to the objection.

A. In effect they are substantially the same.

Q. 163. Is it not a fact that the difference between the California grader and the grader of the reissue patent in suit resides in the construction of the rotary wall member of the Strain patent in suit?

Mr. LYON.—Objected to as calling for a conclusion of the witness and as having been fully determined in the prior hearing in this [148] case, and *res adjudicata* between the parties, and not cross-examination.

The MASTER.—The objection is sustained. Answer the question subject to the objection.

Mr. ACKER.—An exception is noted.

A. Practically so.

Q. 164. In what manner does the form of mounting the rollers of the new Parker grader and the manner of driving or rotating the same and the manner of adjusting said rollers differ from the form of mounting and the form of adjustment and the manner of driving the rolls of the machine which you examined in the Pasadena packing-house and which you have re-

(Testimony of Fred Stebler.)

ferred to in your testimony here?

Mr. LYON.—Do you mean first examination or second?

Mr. ACKER.—The first examination. And I may state as referred to in the affidavit filed by you in connection with Equity Suit A-92, Stebler vs. Parker et al.

Mr. LYON.—Submit the affidavit to him.

A. I can answer the question except with reference to the affidavit.

The MASTER.—It is the Pasadena Orange Growers as compared with this one at Riverside. How do they differ? The affidavit has nothing to do with it.

A. He has got the California grader involved that we saw at Rialto.

The MASTER.—No; he asked with reference to the Pasadena one, with reference to the method of its being operated and driven as compared to the one at Riverside.

A. The first two machines reconstructed at the Riverside Orange Growers' Association appear to be practically the same as those first installed at the packing-house of the Pasadena Orange Growers' Association. They are practically the same. Both have [149] straight rollers. The manner of mounting and driving them appears to be practically the same.

[Testimony of George D. Parker, for Defendant (Recalled).]

GEORGE D. PARKER, recalled on behalf of defendant testified as follows:

Direct Examination.

(By Mr. ACKER.)

Q. 210. You heard the testimony given this morning by Mr. Stebler relative to your new grader, and the comparison made by Mr. Stebler between your new grader and the grader of the Strain reissue patent in suit, did you not? A. Yes.

Q. 211. What have you to say in regard to said statement and please state whether you agree with Mr. Stebler. If not, wherein you differ from him, and your reasons therefor.

A. I do not agree with him. The sizer we are building is the same as the old California sizers. It operates in the same manner and does the same work. There is no independent adjustment of the rolls. The rolls in this sizer being rotated one through the other, having a common bearing for the two adjacent rolls, any adjustment of this bearing necessarily affects both rollers the same as the California grader. In the old California sizer composed of one traveling member for carrying fruit, the opposing member being a plurality of rotated rolls. These common bearings being adjusted to and from the rope or belt to vary the size of the grade opening being entirely similar to the ones we are placing on the market at the present time, and they are not independently adjustable. In the Strain patent the feature [150]

(Testimony of George D. Parker.)

different from the California sizer resides only in the addition of one additional bearing member, each roller having two bearings so that it can be adjusted back and forth entirely independent of the adjacent roller, this being the only difference between the Strain reissue patent and the former California machines having the common bearing for the ends of the two rollers. Mr. Stebler has stated that in our sizer we have an independent adjustment. This is not correct, and cannot be so under the construction. If you vary the bearing either way you must necessarily move or adjust both rolls that are connected to that bearing, as both ends of the two adjacent rolls are moved together, and this will vary the gradeway of both rolls.

Q. 212. Please state how the new Parker grader compares in function, effect, operation and construction with the California grader situated and in use at the Rialto packing-house, and which we examined yesterday, and as illustrated by Defendant's Exhibit Photo Exhibits 3, 4 and 5.

Mr. LYON.—Objected to as incompetent and inadmissible under the decree in this case, the said matter being *res adjudicata,* and upon the further ground that it appears from the testimony in this case that the said Rialto grader is not a part of the prior art, but built years after the invention by Thomas Strain, the subject matter of the reissue patent in suit, and, therefore, irrelevant, immaterial and incompetent for any purpose in the case.

The MASTER.—The objection is overruled.

(Testimony of George D. Parker.)

Mr. LYON.—Note an exception.

A. They are absolutely the same in general function, operation and construction.

Q. 213. (By Mr. ACKER.) Please state how the union of one roll to the other in the rollers of the new Parker grader compare with [151] the union between the respective rollers of the California grader, as disclosed by said photograph exhibits and as examined by you yesterday at the Rialto packing-house.

Mr. LYON.—The same objection is noted as to the last question.

The MASTER.—The same ruling.

Mr. LYON.—Note an exception.

A. They are practically the same, one bearing between the ends of the two adjacent rollers and the pin or shaft rotating both rolls in unison, the driving of the upper roll or first roll in the series by means of the pin rotating the second roller and revolved throughout the entire line of rollers.

Q. 214. (By Mr. ACKER.) Please state whether in either the California grader, as exemplified by the said photograph exhibits, and the Parker new grader, whether there would be rotation of the connected rollers of the grade runway if the power was removed from the end of the first roller which drives the series, and, by "rotation" I mean frictional contact of fruit as passed through said runway.

Mr. LYON.—The same objection, and the further objection that it is irrelevant and immaterial.

The MASTER.—The objection is overuled.

Mr. LYON.—Note an exception.

(Testimony of George D. Parker.)

A. The rolls unless power driven would not revolve.

Q. 215. (By Mr. ACKER.) Would it be possible to grade the fruit through the utilization of the roller grader if the rollers are not rotated?

Mr. LYON.—Same objection.

The MASTER.—The same ruling.

Mr. LYON.—Note an exception.

A. No, sir.

Q. 216. (By Mr. ACKER.) Please state at the time of your advent [152] into the art as a manufacturer of grading machinery for fruit, what class or types of devices were open to you to construct, build, and place on the market for the grading of fruit?

Mr. LYON.—Objected to as *res adjudicata,* incompetent and not the best evidence, calling for a conclusion of the witness as to a question of law.

The MASTER.—The objection is sustained, because he states at the time he first went into the grading business. That has been *res adjudicata.* The question that I understand you to present is, at the time he made these new machines, what was open for him to use.

Q. 217. (By Mr. ACKER.) I will put it in a different form. Please state what form of grader or grading machinery for the grading of fruit was open to you to manufacture and place on the market at the time you commenced the building of your new grader.

Mr. LYON.—Objected to as *res adjudicata* in this

(Testimony of George D. Parker.)

case, and on the further ground that it is incompetent, calling for the conclusion of the witness, no foundation laid, not the best evidence, not the proper method of proof, and not admissible under the pleadings.

The MASTER.—The objection is overuled.

Mr. LYON.—Note an exception.

A. There was open to me and to the general public as well, several types of graders, one of which was the California grader, which grader was a sizer composed of a belt or rope running in a groove for one side of the common member, and a series of rotated rolls as an opposing member, forming a runway for the fruit in the grader. This was commonly known as the California type of sizer, and had formerly been constructed under the Ish patent. These Ish patents were the pioneer patents in the sizers having a rope or belt for carrying the fruit and a roller as the opposing side. This patent covered all types of rope-and-roller graders. [153] The Strain patent was an infringement of the Ish patent in so far as that rope-and-roller feature is concerned. And until the outlawing of the Ish patent, or California sizer, no one could have made a rope-and-roller sizer, the Ish patent being the pioneer and controlling all others. The Strain patent differed from the California patent—

Q. 218. (By Mr. ACKER.) You need not go into that. The Court has passed on those. I am asking you what form of devices were open to you for the manufacture and sale at the time you commenced

(Testimony of George D. Parker.)

the placing of the new grader on the market.

Mr. LYON.—The same objection.

The MASTER.—The same ruling.

Mr. LYON.—Exception.

A. The California sizer.

Q. 219. (By Mr. ACKER.) Please describe the various forms of California sizer which were on the market and in public use in the packing-houses in the Southern District of California at the time you commenced the manufacture and sale of this new type of grader, stating the time you commenced the manufacture and sale of such new type of grader.

Mr. LYON.—The same objection as last noted, and as not involving the correct rule of law, for the reason that what the witness may term the California type of sizer may or may not have been open, inasmuch as such date was years subsequent to the invention of Thomas Strain and the issue of the Strain reissue patent in suit. In this connection we insist that no prior art other than that which has been shown to the Court and pleaded in the original answer and considered upon the decision upon which the interlocutory decre is based, is admissible before the Master in this connection, and that the scope of the Strain invention is *res adjudicata* and must be determined upon the record made in this [154] case and upon the decision of the Court of Appeals in this case.

The MASTER.—I agree with you as to the scope of the Strain patent—that that is not in issue here at all. Counsel has referred to new appliances that

have been made by Mr. Parker since the entry of the decree in this case, and as to whether or not they are infringements or modeled after some design of a patent which has expired.

Mr. LYON.—That comparison under our contention must be made with the prior art as shown in the original record, and any comparison of such prior art is not objected to. But any addition is objected to on the ground that it is not pleaded, inadmissible and *res adjudicata.*

The MASTER.—The objection is overuled.

Mr. LYON.—Exception.

A. I commenced the manufacture and sale of the new type in 1913, in March.

Q. 220. (By the MASTER.) Now, proceed. What was on the market at that time? State the types of California graders that were on the market at that time.

A. There were a number of California sizers in which the rolls were end to end, having a common bearing, and a rope or traveling member for carrying the fruit through the runway. Practically only one type of California sizer.

Q. 221. (By Mr. ACKER.) Please examine the photographs before you and state whether they represent one of the forms of California sizer in the market at the time you entered on your manufacture of the new type of grader.

Mr. LYON.—Objected to on each of the grounds stated in the last objection.

The MASTER.—The same ruling.

(Testimony of George D. Parker.)

Mr. LYON.—Exception. [155]

A. Yes, sir.

Q. 222. (By Mr. ACKER.) When did you enter the field as a manufacturer of the fruit grader held to be an infringement in the present suit?

A. In 1909.

Q. 223. What part of the year 1909?

A. In the latter part—September or October.

Q. 224. How does the construction of the new machine which we examined yesterday at Riverside Heights packing-house differ, if at all, so far as relates to mounting, the manner of adjustment of the rollers, the matter of uniting the rollers one to the other, and the manner of driving the rolls, from the mounting of the rollers and the adjustability of the rollers and the manner of driving the rollers that were installed by you at the Pasadena packing-house.

A. In the machines of the type manufactured between 1909 and 1913, one of which was in the Riverside Heights in their Seventh Street house, was composed of a unit adjustable longitudinally of the runway but was not power driven.

Q. 225. I am afraid you do not understand the question. You heard the testimony of Mr. Stebler this morning, did you not, as to the new type of grader installed by you at the Pasadena packing-house? A. Yes.

Q. 226. What I wish to ascertain from you is whether or not the form of mounting rollers for adjustability and the form of connecting the rollers one

(Testimony of George D. Parker.)

to the other, and the manner of driving the rollers in the new grader in the Riverside Heights packing-house differed in any manner from the form of connecting the rollers in the Pasadena packing-house.

A. None whatever. [156]

Q. 227. Are you prepared to manufacture and sell the fruit graders without the adjustable bins?

Mr. LYON.—Objected to as leading, irrelevant and immaterial.

The MASTER.—I don't understand what you mean by adjustable bins.

Mr. ACKER.—The adjustable bin installation and the material which enters into those is the matter referred to in the second sheet of Mr. Stebler's statement, and is also the matter referred to by Mr. Parker in the separate schedule or statement on the grader member and is the part referred to in one statement of the schedule of Mr. Parker and referred to in one of the schedules or sheets of Mr. Stebler. Now, I wish to ascertain from this witness whether he was equipped or prepared to manufacture that grader as a grader without the adjustable bin installation.

The MASTER.—I don't understand the question that way.

Mr. LYON.—The same objection. The question here is not what he is prepared to do but what he did.

The MASTER.—The objection is sustained. Answer the question subject to the objection.

(Testimony of George D. Parker.)

Mr. ACKER.—An exception is noted.

A. Yes, sir.

Q. 228. (By Mr. ACKER.) What would have been your selling price for a fruit grader without the matter called for by the adjustable bin units?

Mr. LYON.—The same objection.

The MASTER.—Overuled.

Mr. LYON.—Exception.

A. $175.

Mr. ACKER.—That is all.

The MASTER.—Cross-examine. **[157]**

Cross-examination.

(By Mr. LYON.)

Q. 229. Did you ever at any time sell a grader without the bins in California? A. No, sir.

Q. 230. Referring now to the new type of grader that you installed in the Pasadena Orange Growers' packing-house at Pasadena, California, that was first provided with leaves or trap-doors and adjusting devices so that the grade opening formed between the belt resting on these leaves or trap-doors and the roller could be varied by transverse adjustment independent for each opening, was it?

Mr. ACKER.—The question is objected to on the ground that the record in connection with the said suit A–92 pending in the District Court for the Southern District of California, shows that no fruit grader was ever installed by this witness in the Pasadena packing-house in accordance with that defined in the last question.

The MASTER.—I do not understand that there is

(Testimony of George D. Parker.)

any decree or anything like that.

Mr. ACKER.—There has been no hearing on that case. As the affidavits in the case show, there was no sale or installation of a device of that construction.

The MASTER.—As I understand, the affidavits may show it, but there has been no determination by the Court.

Mr. ACKER.—There has been no determination or hearing one way or the other?

The MASTER.—Answer the question.

Mr. ACKER.—Exception.

A. During the construction of this machine, in an experimental way we put on adjustments to the rolls and also had an opening in the bottom, but we found the opening in the bottom was of no value. **[158]**

Q. 231. (By Mr. LYON.) You were installing two of such machines in the Pasadena Orange Growers' packing-house at the time that this suit by Mr. Stebler against you, No. A–92, was brought?

A. We were installing; yes.

Q. 232. And you then abandoned the use of such trap-door or leaf construction and nailed those up on those machines?

A. We found that they were inoperative.

Q. 233. You nailed them up after the bringing of the suit?

A. Before the completion of the machine we found that it was not of any value whatever.

Q. 234. But it was after the bringing of the suit and service of papers that you did that?

(Testimony of George D. Parker.)

A. Yes, sir; and before the completion of the machine.

Q. 235. Now, what was the next step that you took on that machine? The putting in of the sticks to block out part of the rolls?

A. The door was there—

The MASTER.—He asks whether the sticks was the next step you took to block out the rolls?

A. I am not sure whether the sticks were there or not. They may have been.

Q. 236. (By Mr. LYON.) And for what purpose do you use those sticks in that machine and in the machine at the Riverside Heights Orange Growers' Association packing-house, the one to which the attention of the Master was directed yesterday afternoon, and which sticks block out all of the lower half or more of each roller portion from forming a grade opening?

Q. 237. (By the MASTER.) What is the purpose of those sticks in that grader at the Riverside Heights Association packing-house?

A. To make a distinction between the sizes.

Q. 238. (By Mr. LYON.) In other words, to block off the portion **[159]** of the roll and runway covered by such stick from forming any portion of the grade opening. Is that it?

A. There is practically one-eighth of an inch difference in the size of the oranges.

Q. 239. (The MASTER.) It is to prevent those oranges of that size going through the rolls at the

lower end? Is that it?

A. The roller must be practically parallel with the runway in that size.

Q. 240. (By Mr. LYON.) Re-read the question to the witness and see if he can give an answer. Add this to the record. I wish to afford the witness the fullest opportunity to explain the use of these devices in said machine. (The question is read.)

A. Yes, sir.

Q. 241. And the purpose of using the tapered roll in the other machine to which the Master's attention was directed yesterday afternoon at the Riverside Heights Orange Growers' Association packing-house at Riverside, with the large ends of the rolls away from the receiving portion of the machine, was for the same purpose as these sticks, and to permit the line of the roll to be parallel when adjusted? That is, parallel to the belting used?

A. I can answer that best by explaining the action of the fruit—

Q. 242. Please answer the question, and then make any explanation you may desire. I desire to afford you the most full opportunity to explain this.

A. It is to make the opening between the belt and the roller parallel. In the manufacturing proposition uniformity of units is to be desired. In the operation of the sizer 95 per cent of the fruit—Suppose two parallel lines or rolls composing the sizer, one being an eighth of an inch further away from the belt than the other. As the fruit would leave one roller and **[160]** pass to the next roller,

(Testimony of George D. Parker.)

an eighth of an inch further away, 95 per cent of the fruit would drop at the end of the roller in the first, probable, three or four inches. But with a parallel opening the rest of the way, there would be no fruit dropped till it came to the next offset of an eighth of an inch.

Q. 243. What is the difference in diameter of these tapered rolls, comparing the diameters of the small end and the diameters of the large end?

A. I think about three-eights of an inch. From a quarter to three-eights of an inch.

Q. 244. Are these diameters varying as you progress along the runway? In other words, are the tapered rolls of the same size or are they of different sizes progressively?

A. They are all uniform in size.

Mr. LYON.—That is all.

Redirect Examination.

(By Mr. ACKER.)

Q. 245. Whatever purpose these filler sticks referred to may have been employed for, please state whether or not in changing the adjustment of one roller whether you vary the grading aperture of the adjacent roller.

Mr. LYON.—Objected to as leading.

The MASTER.—The objection is overruled.

A. They are affected in the same manner. Any adjustment of one roller affects the one adjacent to it.

Mr. ACKER.—That is all.

(Testimony of George D. Parker.)

Recross-examination.

(By Mr. LYON.)

Q. 246. It does not affect the whole of the adjacent roller, but only affects the end toward the one which has been adjusted? Is that correct? **[161]**

A. No, sir; it is not correct.

Q. 247. How can a roller, one end of which is on a fixed pivot, be materially affected by the adjustment of the other end two or three feet away, and an adjustment of not more than an eighth of an inch?

A. I think our demonstration yesterday showed that it did.

Q. 248. What is the length of those rollers in the machine? A. About three feet.

Mr. LYON.—That is all.

Redirect Examination.

(By Mr. ACKER.)

Q. 249. What was the length of the rolls on the California grader at the Rialto packing-house?

Mr. LYON.—The same objection is noted as in the objection to the several questions asked this witness in regard to the said alleged California grader.

The MASTER.—The objection is overruled.

Mr. LYON.—Exception.

A. From 3 feet to 42 inches.

Q. 250. (By Mr. ACKER.) Would a change in the adjustment of one roller in that California sizer vary the grade aperture of the adjacent roller in the same manner as would occur in the new Parker

(Testimony of George D. Parker.)

grader at the Riverside house which we examined yesterday, the change being made in the adjustment of one roller?

Mr. LYON.—Objected to as calling for a conclusion of the witness and as leading.

The MASTER.—The objection is sustained.

Mr. ACKER.—An exception is noted.

The MASTER.—Do you want it answered?

Mr. ACKER.—Yes.

The MASTER.—Answer the question subject to the objection.

A. Yes, sir. **[162]**

GEORGE D. PARKER, recalled for continuation of complainant's direct examination:

Direct Examination (Continued).

(By Mr. LYON.)

Q. 251. In your statement first filed herein you have referred to an item of $848.98, advertising. That is your general advertising expense for advertising all of your products during the time from September 30, 1909, to March 10, 1913? A. Yes.

Q. 252. And you were during that time manufacturing and advertising a full line of packing-house machinery and box-nailing machines, etc., were you?

A. Yes.

Q. 253. Is there any way that you can segregate for us the proportion of that advertising which was exclusively for the promotion of the sale of these infringing graders, or was such advertising done as a whole and so commingled as to be impossible to

(Testimony of George D. Parker.)

properly and definitely segregate what portion was for each?

A. I should think it would just take its just proportion relative to the sales made.

Q. 254. There is no way that you could segregate it by the amount of advertising, or the amount of actual expense?

A. I don't think so, at this time.

Q. 255. In this statement you have an item of $425.32. Is that depreciation on machinery?

A. Depreciation on machinery 10 per cent. The stenographer evidently has made a mistake in carrying out the interest. He put $121.52 instead of $12,152.04. Ten per cent of that would amount to $1,215.20. **[163]**

Q. 256. This machinery upon which you have so figured a depreciation includes the machinery used by you in the manufacturing of these automatic box machines? A. Yes, sir.

Q. 257. Do you use all of that machinery in the manufacture of fruit graders? A. Yes.

Q. 258. What is the item "machinery up-keep $1,486.14." in this account?

A. That was the repairing of break-downs.

Q. 259. That would be part of the natural up-keep of your machinery, would it? A. Yes.

Q. 260. In the statement filed by you of overhead expense from April 1, 1913, to July 1, 1914, you have an item there of interest, $651.20. What is that interest? A. For money borrowed.

Q. 261. And the item of $921.59 in this last state-

(Testimony of George D. Parker.)

ment—depreciation—is figured upon the same basis as the item of $425.32 in statement F of the first report, is it? A. No, sir.

Q. 262. Not on the same basis?

A. On the same basis, but not on the same amount.

Q. 263. I understand that, but not on the same basis. Then what is the item of "machinery up-keep" in this former expense report of April 1, 1913, to July 1, 1914, $347.49? Is that machinery repairs during that time? A. No, sir. **[164]**

Q. 264. That is part of the up-keep of the machinery, is it? A. Yes.

Q. 265. The figures of 10 per cent depreciation is an estimate which you have made upon the basis of ten per cent?

A. It is less than is ordinarily struck off for machinery of this class.

Mr. LYON.—We move to strike the answer out as not responsive and ask that the question be re-read to the witness.

The MASTER.—The motion will be granted, but you can explain.

A. Yes.

The MASTER.—Do you wish to explain?

A. It is ordinarily considered that machinery or the natural life of machinery of that type will depreciate and also be out of date within ten years.

The MASTER.—Equal to or more than 10 per cent?

A. Ten per cent. Some folks use as high as 25

in their depreciation. The packing-houses around the country use 25.

Q. 266. (By Mr. LYON.) In the same statement of April 1, 1913, to July 1, 1914, appears the item "Stockroom and drayage $1,037.85." Of what is that item made up?

A. That includes the salary of the man in the stockroom and the transfer of material from the freight depots to the shop and from the shop to the railroads or anywhere else around town.

Q. 267. And includes the drayage and stockroom expense of your total business? A. Yes.

Q. 268. Is there any way of segregating that by your books or in any other manner so as to be limited to the manufacture and sale of the new type graders, from April 1, 1913, to July 1, 1914, alone?
[165]

A. No; I think not.

Q. 269. The item "shop expense" (foreman) $1,359.19, is the salary of your shop foreman?

A. Yes, sir.

Q. 270. And he is shop foreman of your whole business?

A. No, sir. He takes care of the machinery of the machine-shop and wood-working shop.

Q. 271. And that machine-shop, I believe you have stated, was used in the manufacture of your automatic box-nailing machines and other devices, as well as the graders? A. Yes.

Q. 272. And is there any way of segregating what proportion of his expense is necessarily charged to

(Testimony of George D. Parker.)

the grader account simply and what is properly chargeable to the rest of your business?

A. I should say it should take its just proportion.

Q. 272. And is there any way of fixing from your books that proportion? A. Yes.

Q. 274. How? A. By the amount of sales.

Q. 275. I will ask you to make an examination of such books and before we adjourn to-day answer the question as to what proportion is chargeable solely to this grader account of that item.

Mr. ACKER.—The last request is objected to because under the law controlling an accounting, where either a defendant or the complainant is engaged in a general line of business of which the infringing article constitutes only one portion thereof, the entire gross expense of the running of the business is always required to be given and the Master will then determine the proportion that the particular item in controversy bears to the total. **[166]**

The MASTER.—Are you willing to stand on your part of it and let him stand on his?

Mr. LYON.—If the defendant will assume the burden of such apportionment, yes. As to the item of this overhead expense, I am willing to take his statement.

Mr. ACKER.—We have produced in connection with our statements a statement of Overhead Expense, and that statement is left to the Master to properly apportion in accordance with the general business of the defendant. All the defendant is re-

quired to give is to give the gross amount of business and the gross receipts for that amount of business, and the gross receipts of the particular item in controversy, and the Master will make the proper and just proportion as he sees fit.

The MASTER.—What I wanted to say is, you both stand on your proposition. Mr. Lyon, do you insist on their going ahead and furnishing, or are you willing to take that statement of Mr. Acker that it is the duty of the Master to apportion it? How could the Master apportion anything arbitrarily?

Mr. LYON.—I am willing to take Mr. Acker's statement providing, however, one thing, on behalf of the defendant: that is, that the defendants do on their own behalf undertake the burden of showing before the Master all such items as they desire the Master to consider upon any question of such apportionment, and I will accept the rule by stipulation as counsel states.

Mr. ACKER.—Just explain a little more clearly what you mean by the burden.

Mr. LYON.—That is the duty of the defendant, and that the defendant will produce such evidence as to the gross business done by him, or other matter in which he insists under your statement the Master shall make such apportionment. In other words, you admit that it is your duty to produce that evidence and not the duty of complaint. **[167]**

Mr. ACKER.—I propose, and have always proposed, to give you the gross amount of business done

(Testimony of George D. Parker.)

by this defendant for the entire business during the infringing period, and the gross amount received for the infringing articles. Now, it is for the Master to apportion that. The law does not require the defendant to do it. We cannot. It is a matter for the Master to do. And, strange as it may appear on a matter of this kind, the burden of nothing is assumed by the defendant; but under the law the burden is on the complainant.

The MASTER.—Then that is the understanding. That is, you have furnished certain items and you expect the Master, from those items, to figure out what the proportion is.

Mr. ACKER.—Yes; I have asked Mr. Stebler to produce the same for him.

Mr. LYON.—We will do that. We will accept your producing the proof on which to base the proportion.

Mr. ACKER.—I am producing the statement from our books.

The MASTER.—That is what I wanted to know.

Mr. ACKER.—That is what I always understood I was to do. The law requires me to do that.

Q. 276. (By Mr. LYON.) What does this item of "Office Expense $1,583.87" in this same statement of Overhead Expense from April 1, 1913, to July 1, 1914, include? The entire office expense of your business? A. Yes.

Q. 277. Any salary or personal expense of your own in that? A. No, sir.

(Testimony of George D. Parker.)

Q. 278. I will ask you the same question in regard to the item of "Office Expense $6,089.03" in Statement F of your first statement filed. What does that item include? **[168]**

A. Office expenses.

Q. 279. What office expenses?

A. That does not include anything for me.

Q. 280. Does it include any moneys at all that you yourself have used out of that business?

A. No, sir.

Q. 281. Does it include any interest on past due accounts? A. No, sir; I think not.

Q. 282. But it includes the entire office expense of your entire business during that time referred to in the statement? A. Yes.

Q. 283. When did you commence to build the first machine for the Riverside Heights Orange Growers' Association of the type held by the interlocutory decree to be an infringement of the patent in suit? Was it not in 1910? A. 1910.

Q. 284. And that was the first machine of that type that you manufactured and sold?

A. No, sir.

Q. 285. To whom did you sell a machine of that type before?

A. The Fernando Fruit Growers' Association at San Fernando.

Q. 286. And when did you commence the manufacture of that machine?

A. October or November, 1909.

(Testimony of George D. Parker.)

Mr. LYON.—That is all.

Mr. ACKER.—I suggest that we adjourn now so that Mr. Lyon and I can get together.

(An adjournment is now taken until 2 o'clock P. M. of this day at this same place.) **[169]**

[Proceedings Had August 8, 1914, 2 P. M.]

Glenwood Inn, Riverside, Cal.

August 8, 1914, 2 o'clock P. M.

This being the time and place to which the further taking of proofs in this case was continued, proceedings are now resumed.

Present: Hon. LYNN HELM, Special Master.
FREDERICK S. LYON, Esq., Solicitor for Complainant.
N. A. ACKER, Esq., Solicitor for Defendant.

Mr. LYON.—For the purpose of eliminating any necessity for calling either the complainant or defendant Parker for further testimony in regard to the respective statements of cost and expense filed by them herein, it is hereby stipulated:

[Stipulation Re Acceptance of Statement Filed by Defendant Parker, etc.]

1. Complainant accepts the two statements filed by the defendant Parker, showing the costs of manufacture, sale and installation of the complete infringing machines, both of the type manufactured under Complainant's Exhibit Parker patent and the two new types as claimed to be an infringement and submitted for the decision of the master, as correct, with

such exceptions as have heretofore been noted on the record by correction or as corrected by the testimony of the defendant Parker. This stipulation, however, not accepting the two statements of overhead expenses, which respective statements are accepted as correct in so far as the items therein set forth are set forth, but reserving all objections to the proper allowance as overhead expenses of any of the items thereto. And in this connection it is stipulated that for the purpose of comparison of the portion of overhead expense, if any, to be charged against the grader business, the gross business of the defendant Parker for the period from March, 1912, to and including March, 1913, [170] including such items as are set forth in statement F therein, amount to the sum of $8,684.59, while the gross business of said Parker during said time amounted to the sum of $83,000; that during the period of April, 1913, to and including April, 1914, the overhead expense of said defendant Parker's said business, including therein such items as are set forth in the Overhead Statement accompanying the defendant Parker's supplemental report, amounted to $7,469.45, and the defendant Parker's gross business during the said time $1,208.40. The stipulation reserving the objection to the items as to whether particular items are allowable, but not objecting to the amounts of such items. This stipulation with respect to the volume of business and the gross overhead expense for the period between March, 1912, to and including March, 1913, may be taken as an average of the overhead expense during the period covered by the first and

original statement of account filed on behalf of defendant Parker herein, and the volume of gross business per year.

2. The same stipulation in regard to the overhead expense account of complainant, and the items thereof, are agreed to and stipulated subject to the same objections as to the particular items being allowable or chargeable as overhead expense, but no objection being made to the amount of such items, such statement of overhead expense on behalf of complainant during the period of October 1, 1912, to and including October 1, 1913, being as follows: Office supplies, $256; general expense, $689.12; office and labor expense, $1,989.73; light, power and water, $334.95; taxes, $192.75; insurance, $217.85; depreciation on buildings, $7,050 at 2½ per cent, $176.25; depreciation on machinery, value, $8,049.97, at 5 per cent, $427.50. Total, $4,254.15. Gross business during said time, $95,933.21. That the sales of graders during said time amounted to $19,065, and that this is to be accepted as a general average upon which to compute [171] the proportion of overhead expense due to the greater business, such overhead expense *pro rata* to be established by the Master in accordance with the stipulation hereinbefore entered.

Mr. ACKER.—I have no further testimony to offer on behalf of the defendant.

Mr. LYON.—That is all of the testimony.

(By consent the matter is submitted on briefs to be filed by counsel for each party within two weeks, three days to each party thereafter to reply.)

I HEREBY CERTIFY the foregoing to be a full,

true and correct transcript of the testimony and proceedings taken and had in the matter of the accounting in the cause therein entitled, before Hon. Lynn Helm, Special Master.

I. BENJAMIN,
Shorthand Reporter.

[Endorsed]: C. C. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn. et al., Defendants. Proofs on Accounting. Before Hon. Lynn Helm, Special Master. Filed Aug. 11, 1914, at 30 min, past 10 o'clock A. M. Lynn Helm, Referee. C. Meade, Clerk. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [172]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Summons, Order or Subpoena.

Pursuant to the Interlocutory Decree entered and enrolled in the above-entitled suit, and in furtherance of the reference therein made for the purpose

of taking and stating an account of the profits, gains and advantages which the defendants and each of them have derived or received in or through the infringement of the letters patent sued on in said suit and found in and by said Interlocutory Decree and assessing the damages which the complainant has sustained by reason of such infringement, you, the said Riverside Heights Orange Growers' Association and George D. Parker, are hereby ordered and directed to appear and attend before me, at the hour of 10:30 A. M. on Wednesday, July 22d, 1914, at my office, Rooms 918–920 Title Insurance Building, Fifth and Spring Streets, Los Angeles, California, and to bring in and render an account or statement in writing under oath, of the number of infringing machines made, sold or used by you or either of you, in infringement of reissue letters patent No. 12,297, dated December 27th, 1904, the details of such manufacture and sale and of each of such sales, and the gains and profits or advantages made or received by you, or either of you, in, by or through the manufacture or sale or use of each of said machines; and also requiring detailed specification in such account of the [173] following items:

First. The total number of graders or sizers made, sold, or used by you, or either of you, and embraced within claim 1 or claim 10 of the said reissue patent to complainant, Number 12,297, and referred to in said Interlocutory Decree.

Second. That you specify and indicate in such statement or account each separate contract entered into by you, or either of you, for the installation of

packing-house machinery, including in such contract and as a part thereof, one or more of such infringing graders and particularly indicating in such statement or account whether such contract was as a whole for the entire equipment contracted for, or whether such contract provided as a separate item thereof, at a price specified therein, the grader or graders contracted for and furnished upon such contract.

Third. That you have with you at said time all the said contracts and vouchers in your possession referring to the manufacture, sale, or use by you, or either of you, of said infringing graders, together with all books and vouchers in your possession which show the cost of labor and materials used in making said infringing machines, especially all day-books, journals, ledgers, order books, blotters, cash-books, time cards, machine and shop records used by you or either of you during said infringing period.

This order is directed to you and each of you, your attorneys, officers, agents, servants, workmen, clerks, and associates, and each of them as may stand in any relation to you in the premises; all in accordance with said Interlocutory Decree and the powers therein and thereby conferred upon me and in accordance with rules 62 and 63 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court [174] of the United States November 4th, 1912, and the Statutes of the United States in such case made and provided.

Dated July 3d, 1914.

LYNN HELM,
Special Master.

[Endorsed]: Cir. Ct. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association et al., Defendants. Before Lynn Helm, as Special Master. Summons, Order or Subpoena to Defendants to File Account, Produce Books, etc. Filed Jul. 6, 1914, at 30 min, past 9 o'clock A. M. Lynn Helm, Referee. C. Meade, Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [175]

[Agreement, June 27, 1911, George D. Parker and El Ranchito Citrus Association.]

George D. Parker, party of the first part, and El Ranchito Citrus Association, *pary* of the second part, hereby enter into the following agreement:

The said party of the first part will sell to said second party:

1	full sizer	$ 425.00
1	half sizer	285.00
1	washer	285.00
1	elevator and dump	110.00
1	elevator	75.00
1	box press, with attachments	78.00
90	ft. pack box conveyor	270.00
28	ft. of sorting table	84.00
	Making a total of	$1,612.00

Said machinery to be placed in the Ranchito Citrus Assn.

Fruit ~~Exchange~~ Packing-house at Rivera, California on or before the first day of October, 1911. The sizers, press and attachments, sorting table and conveyors installed ready for operation; the balance of the machinery to be installed at the expense of the second party.

Second party agrees to pay for the above-mentioned machinery when it is installed and running to their satisfaction.

If for any reason there may be *an* legal proceedings or royalties claimed, the party of the first part hereby agrees to cover the same to the extent of $100 on each full sizer.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 27th day of June, 1911.

GEO. D. PARKER. (Seal)
EL RANCHITO CITRUS ASSN.
By O. W. MAULSBY. (Seal)
C. L. EDMONSTON. (Seal)
J. ALLEN OSMUN. [176]

[Agreement, January 5, 1912, Sierra Madre La Manda Citrus Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this 5 day of Jan. 1912, between The Sierra Madr*a La Manda* Citrus Ass'n., of *La Manda* Park, California, and George D. Parker of Riverside, California,

WITNESSETH: That the said George D. Parker, party of the second part, agrees to perform the following work in the packing house of Sierra Madre Lamanda Citrus Assn.

1st. To install complete ready for the power, one (1) Full Parker No-Drop Sizer, for the sum of Four

hundered, Twenty-five Dollars ($425), & One (1) ½ Parker Sizer for the sum of Two Hundred, Eighty-five Dollars ($285), making a total of Seven Hundred, Ten Dollars ($710).

2d. Any additional work, and materials furnished, shall be done by the day, at the usual rate for such labor and materials.

All of the above work shall be performed in a workmanlike manner and the materials furnished are to be suitable in every way to complete said work.

It is further agrred that the party of the second part, shall protect the party of the first part, against any royalties that may be collected to the amount of One Hundred Dollars ($200) (figure 1 changed to 2 in ink) on each full sizer.

IN CONSIDERATION of the premises and of the faithful and proper performance of the hereinabove mentioned work by the said George D. Parker, The Sierra Madre Lamanda Citrus Assn. agrees to pay the said George D. Parker, the sum of Seven Hundred, Ten Dollars, ($710) together with any extra work, upon completion of said work.

WITNESS our hands and seal the day and year first above written.

M. MORGAN,
Asst. Secy. [177]

[Agreement, August 28, 1911, L. V. W. Brown and George D. Parker.]

THIS AGREEMENT made and entered into this 28th day of August, 1911, between L. V. W. Brown of Riverside, Cal., and George D. Parker of Riverside, Cal.

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing-house of L. V. W. Brown at *Higrove,* Cal.

1st. To install, complete ready for the power One (1) full, Parker No-Drop Sizer (excepting any braces or timbers necessary to support the running boards from the roof) for the sum of Four Hundred & Twenty-five Dollars, ($425).

2d. To install Packed Box Conveyors, set up on the floor, ready for power, at Two Dollars & 90/100 ($2.90) per foot.

3d. Any extra labor, or materials furnished, to be charged at the usual rate for such work.

All of the above work shall be performed in a workmanlike manner and the materials used are to be suitable in every way to complete said work.

It is further agreed that the party of the second part, shall protect the party of the first part, against any royalties, that may be collected, to the amount of One Hundred Dollars.

IN CONSIDERATION of the premises and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker, L. V. W. Brown agrees to pay the said George D. Parker, Four Hundred Twenty-five Dollars, together with any extra labor and material furnished, upon completion of said work.

WITNESS: Our hands and seal the day and year first above written.

L. V. W. BROWN.
By M. S. DENISON.
GEORGE D. PARKER.

The work to be completed before December 1st, 1911. [178]

[Agreement, October 14, 1911, Anaheim Orange Growers' Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this 14th day of Oct., 1911, between Anaheim Orange Growers' Association and George D. Parker of Riverside, California.

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing-house of Anaheim Orange Growers' Association:

1st. To install, complete ready for the power, Two (2) Full, Parker No-Drop Sizers @ Four Hundred, Twenty-five Dollars ($425) each making a total of Eight Hundred Fifty Dollars ($850).

2d. 1–Brushing Machine, F. O. B. Factory for the sum of Two Hundred Eighty-five Dollars ($285).

3d. 1–Covey Press, and other Machines, or Machinery at the usual price for same.

4th. Sorting table, line shafting etc. to be installed by the day, and charged for at the usual prices for such materials and labor.

All of the above work shall be performed in a workmanlike manner, and the materials used are to be suitable in every way to complete said work.

It is further agreed that the party of the second part shall protect the party of the first part, against any royalties that may be collected, to the amount of One Hundred Dollars ($100) for each full sizer.

IN CONSIDERATION of the premises and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker,

Anaheim Orange Growers' Assn. agrees to pay the said George D. Parker the sum of $1,135 together with any extra labor and materials furnished, upon completion of said work, this work to be completed on or about Nov. 20, 1911.

WITNESS our hands and seal the day and year first above written,

ANAHEIM ORANGE GROWERS' ASSN.

[Seal] L. D. THOMAS,

Prest.

GEO. H. MAXFIELD,

Secy.

GEO. D. PARKER. [179]

[Agreement, Placentia Orange Growers' Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this —— day of ——, 1911, between The Placentia Orange Growers' Assn. of Placentia, California, and George D. Parker of Riverside, California.

WITNESETH: That George D. Parker, party of the second part agrees to perform the following work in the packing house of The Placentia Orange Growers' Assn., at Placentia.

1st. To install complete ready for the power, One Full Parker No-Drop Sizer, for the sum of Four Hundred, Twenty-five Dollars ($425).

Brusher (in pencil)

2d. One (1) six foot, four run Orange ~~Washer~~ F. O. B. Factory, for the sum of Two Hundred, Eighty-five Dollars ($285).

3d. To install, complete, ready for the power, packed box conveyor, @ ($3) per foot.

4th. Any additional work and materials furnished shall be done by the day, at the usual rate for such labor and materials.

All of the above work shall be performed in a workmanlike manner and the materials used are to be suitable in every way to complete said work.

It is further agreed that the party of the second part shall protect the party of the first part against any royalties that may be collected to the amount of One Hundered Dollars ($100).

IN CONSIDERATION of the premises and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker, The Placentia O. G. Assn., agrees to pay the said George D. Parker, the sum of ——— together with any extra work upon completion of said work.

WITNESS our hands and seal the day and year first above written.

PLACENTIA ORANGE *GROWER* ASS.

By A. PIEROTTI.

GEO. D. PARKER. [180]

[Agreement, December 22, Elephants Orchards and George D. Parker.]

THIS AGREEMENT, made and entered into this 22d day of December between ELEPHANT ORCHARDS and George D. Parker of Riverside, California.

WITNESSETH: That George D. Parker, party of the second part agrees to perform the following work in the packing-house *of Packing-house* of Elephant Orchards.

1st. To install, complete ready for the power, One

(1) Full Parker No-drop Sizer for the sum of Four Hundred, Twenty-five Dollars, ($425).

2d. Any additional work and materials furnished, shall be done by the day, at the usual rate for such labor and materials.

All of the above work shall be performed in a workmanlike manner and the materials furnished, are to be *sutiable* in every way to complete the said work.

It is further agreed that the party of the second part, shall protect the party of the first part, against any royalties that may be collected to the amount of One Hundred Dollars ($100).

IN CONSIDERATION of the premises, and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker, ELEPHANT ORCHARDS agrees to pay the said George D. Parker the sum of Four Hundred, Twenty-five Dollars ($425), together with any extra work, upon completion of said work.

WITNESS our hands and seals the day and year first above written.

ELEPHANTS ORCHARDS,
By L. L. MOORE. [181]

[Agreement, December 30, 1911, F. Schwan & Bealey and George D. Parker.]

THIS AGREEMENT, made and entered into this 30 day of December, 1911, between F. Schwan & Bealey of Pomona, Calif. Parties of the first part & George D. Parker of Riverside, California.

WITNESSETH: That George D. Parker, party of the second part, agrees to perform the following

work in the packing-house of F. Schwan & Bealey.

1st. To install, complete ready for the power, One (1) Full Parker No-Drop Sizer for the sum of Four Hundred, Twenty-five Dollars ($425.)

2d. Any additional work, changing sorting table, and resetting shafting and machinery to be done by the day at the usual rate for such labor and materials.

All of the above work shall be performed in a workmanlike manner and the materials used, are to be suitable in every way to complete said work.

IN CONSIDERATION of the premises and of the faithful and proper performance of the herein above mentioned work, by the said George D. Parker, F. Schwan & Bealey agrees to pay the said George D. Parker the sum of Four Hundred & Twenty-five Dollars together with any extra work ~~upon completion of said work~~ as follows one-third (⅓) in thirty days (30) one-third (⅓) in 60 days and one-third (⅓) in ninety days (90) after completion of said work.

WITNESS OUR HANDS AND SEAL the day and year first above written.

F. SCHWAN & BEALEY,
By F. SCHWAN. [182]

[Agreement, August 15, 1911, I. L. Lyon & Son and George D. Parker.]

THIS AGREEMENT, made and entered into this 15th, day of August, 1911, between I. L. Lyon & Son, of Redlands, California and George D. Parker, of Riverside California.

WITNESSETH: That the said George D. Parker agrees to perform the following work: To install Two (2) Parker No-Drop Sizers in the house of I. L.

Lyon & Son at Redlands, California.

1st. These machines to be installed complete ready for the power. All work to be performed in a first class manner, for the sum of Eight Hundred Fifty Dollars ($850).

2d. Any extra labor or material that may be needed to brace the roof to support the cull belt or running board, to be extra. The sizers to have bins Thirty-four (34) feet long.

All of the above work, shall be performed in a workmanlike manner and the materials used, are to be suitable in every way to complete the said work.

IN CONSIDERATION of the premises, and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker: The I. L. Lyon & Son, agrees to pay the said George D. Parker, the sum of Eight Hundred, Fifty Dollars (850), upon the completion of the said work, this work to be completed by November 1st, 1911.

WITNESS our hands and seal the day and year first above written.

I. L. LYON & SONS,
By HILL.
GEO. D. PARKER. [183]

[Agreement, October 17, 1911, El Camino Citrus Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this 17th day of October, 1911, between El Camino Citrus Association and George D. Parker of Riverside, California.

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing-

house of El Camino Citrus Association at Claremont, Cal.

1st. To install, complete ready for the power, One (1) Full Sizer @ Four Hundred Twenty-five Dollars ($425) & Two (2) One-Half (½) Sizers @ Two Hundred Eighty-five Dollars ($285) each.

2d. 4–Parker Reweighers @ 100.00 each $400.00

3d. 1–6 ft. Washer four run @..... 285.00

4th. 1–Car Loading Press @..... 60.00

5th. 1–Dempsey, Little Giant Squeeze. 8.00

6th. 4–elevators for empty packing boxes, under sizers 2–empty box trucks ten feet long, 1–Fairbanks Morse heavy platform truck #236, 2 Covey Presses complete with roller top, and end guides, strapping attachments, etc. 2–packed box conveyors, 1 sorting table, 3–motors, line shafting etc. necssary to connect up all machinery, these items to be charged at the usual rate for such work, and materials or machinery.

All of the above work, shall be performed in a workmanlike manner and the materials used, are to be suitable in every way to complete the said work.

It is further agreed that the party of the second part shall protect the party of the first part against any royalties that may be collected to the amount of $100 for each full sizer.

IN CONSIDERATION of the premises, and of the faithful and proper performance of the herein above mentioned work, by the said George D. Parker, El Camino Citrus Association agrees to pay the [184] said George D. Parker ~~the sum of~~ for ma-

chinery, material &c. as indicated above together with any extra work upon completion of said work, this work to be completed on or ~~about~~ before Jan. 1st 1912.

WITNESS our hands and seal the day and year first above written.

EL CAMINO CITRUS ASSOCIATION.
By WILLIS S. JONES,
Pres.
P. H. NORTON,
Secy.
GEO. D. PARKER. [185]

[Agreement, September 28, 1911, Between Randolph Fruit Co. and George D. Parker.]

THIS AGREEMENT, made and entered into this 28 day of Sept., 1911, between the Randolph Fruit Co., of Highland, California, and Geroge D. Parker of Riverside, California.

WITNESSETH: That the said George D. Parker agrees to perform the following work in the packing-house of the Randolph Fruit Co., at Highland, California.

1st. To install, complete ready for the power, One (1) full, Parker No Drop Sizer for the sum of Four Hundred, Twenty-five Dollars ($425).

Any braces, or timbers needed to support cull belt and running board from ceiling if needed to be charged extra, in addition to above mentioned prices.

2d. Any work not specified, in addition to above to be paid for at the usual rate for such work.

All of the above work shall be performed in a workmanlike manner, and the materials used are to

be suitable in every way to complete said work.

It is further agreed that the party of the second part, shall protect the party of the first part, against any royalties that may be collected, to the amount of One Hundred Dollars ($100).

IN CONSIDERATION of the premises and of the faithful and proper performance of the herein above mentioned work by the said George D. Parker, the Randolph Fruit Co., agrees to pay the said George D. Parker the sum of Four Hundred Twenty-five Dollars, ($425) together with any extra labor and material furnished, upon completion of said work.

This work to be completed by Nov. 15th.

WITNESS: Our hands and seal the day and year first above written.

L. C. HUTCHINS. [186]

[Agreement, Between H. A. Unruh, Executor Estate E. J. Baldwin, and George D. Parker.]

THIS AGREEMENT, made and entered into this ——— Day of ———, 1912, Between H. A. Urah Executor Estate E. J. Baldwin, Arcadia, California, and George D. Parker of Riverside, California. Witnesseth that the said George D. Parker, agrees to perform the following work in the Packing-house of the Baldwin Estate at Arcadia, Cal.

(1) To install two (2) Parker Full sizers complete with distributing and cull belts binns etc complete ready for the power for $850.

(2) One sorting table for two grades and culls for $180.

(3) One Automatic box elevating dump, $300.

(4) Packing box conveyors set on the floor ready

for the power, @ $3 per foot.

(5) Any other work not specified above to be on time and material basis.

All of the above work shall be performed in a first class manner and the materials used shall be of the proper size and style for the above work.

It is further agreed that the work shall commence on or before the first of December and pushed as fast as possible to get the same in shape to pack fruit by the 15th of December, if possible.

In consideration of the premises and the faithful and proper performance of the herein mentioned work by the said George D. Parker. H. A. Unruh agrees to pay to the said George D. Parker the above sums as specified, upon the completion of the said work.

Witness our hands and seal the day and year first above written.

H. A. UNRUH,
Executor.
Estate of E. J. BALDWIN,
GEO. D. PARKER. [187]

[Agreement, August 24, 1912, Between Covina Orange Growers' Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this 24 day of Aug 1912 between COVINA ORANGE GROWERS' ASSN. and George D. Parker of Riverside, California.

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing house of the Covina Orange Growers' Association, at Covina, California.

1st. To install One (1) Parker Sizer, 34 foot bins, complete with cull belts, and distributing belts, adjustable bins, installed ready for the power for the sum of Four Hundred, Twenty-five Dollars, $425.

2d. To install One (1) of our Mechanical Fruit Drying Machines, together with One (1) 15 H. P. Motor and Blower, suitable for the work, all installed, ready for the electric wiring. (The wiring being excepted) for the sum of Twenty-two Hundred Dollars. ($2,200).

3d. To install ——— feet of Packed Box conveyor for the sum of Three Dollars ($3) per foot, our patent turns to be included without extra cost.

4th. Any other work not specified in the above, to be done on a time and material basis.

All of the above work shall be done in a first class manner and the materials used are to be suitable for the proper installation of the above work.

It is further agreed that the party of the second part, shall protect the party of the first part, against any and all royalties that may be collected to the amount of One Hundred Dollars ($100) for each sizer.

IN CONSIDERATION of the premises and the faithful and proper performance of the herein above mentioned work by the [188] said George D. Parker, the Covina Orange Growers' Association, agrees to pay the said George D. Parker the above specified sums, upon completion of the said work.

WITNESS OUR HANDS AND SEAL the day and year first above written.

COVINA ORANGE GROWERS' ASSN.

[Seal] A. K. EVANS,

Pres.

C. E. CRAWFORD,

Secy.

GEO. D. PARKER. [189]

[Agreement, August 28, 1912, Between Antelope Heights Orange Co. and George D. Parker.]

THIS AGREEMENT, made and entered into this 28th day of August, 1912, between Antelope Heights Orange Co. and George D. Parker of Riverside, California.

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing house of the Antelope Heights Orange Company, at Naranjo, Cal.

1st. To install Two (2) Parker Sizers, 34 foot bins, complete with the cull belts, and distributing belts, adjustable bins, installed and ready for the power for the sum of Four Hundred, Thirty-five Dollars, each making a total of Eight Hundred, Seventy Dollars ($870).

2d. One (1) Two Man, Roller Top Covey Press, with strapping attachment for the sum of Ninety Dollars, ($90) F. O. B. Factory.

3d. One (1) Fruit Elevator, (Miller Style) for the sum of One Hundred, Fifty Dollars, $150.

4th. One (1) Sorting table, 28 feet long, 3 grades, 4 cars capacity for the sum of Two Hundred, Seventy Dollars, $270.

5th. Packed Box Conveyor, at Three Dollars per foot. ($3) including the turns.

6th. Line Shafting, pullies, belting, hangers, to operate above machines for the sum of Three Hundred Dollars, $300.

7th. Any other work not specified in the above to be done on a time and material basis.

All of the above work shall be done in a first class manner, and the materials used are to be suitable for the proper installation of the above work.

It is further agreed that the party of the second part shall protect the party of the first part, against any and all royalties [190] that may be collected to the amount of One Hundred Dollars ($100) on each sizer.

IN CONSIDERATION of the premises and the faithful and proper performance of the herein above mentioned work by the said George D. Parker, The Antelope Heights Orange Company, agrees to pay the said George D. Parker, the above specified sums, upon completion of the said work.

WITNESS our hands and seal the day and year first above written.

ANTELOPE HEIGHTS ORANGE CO.

[Seal] E. S. ST. CLAIR,

Pres.

GEORGE D. PARKER. [191]

[Agreement, November 6, 1912, Between McPherson Heights Citrus Assn. and George D. Parker.]

THIS AGREEMENT, made and entered into this 6th day of Nov., 1912, between the McPherson

Heights Citrus Association of Orange, California, and George D. Parker, of Riverside, California.

WITNESSETH: That the said George D. Parker agrees to perform the following work in the packing-house of the McPherson Heights Citrus Association at

(1) To install two full standard Parker Sizers complete with cull and distributing belt ready for the power for the sum of $850.

(2) To install 4 packing box elevators to bring boxes from basement to floor underneath sizer bin*n*s, $160.

(3) 1 four run 8 foot Washer with sprinkler and pan under brushes to catch drip. F. O. B. cars Riverside, $375.

(4) 1 tank and tank elevator to feed washer F. O. B., $60.

(5) 1 car press F. O. B., $60.

(6) 1 box head beveler with knife to bevel centers and ends. F. O. B., $100.

(7) 2 two man Covey press, Roller top, with front guard, reel and stand, (as per Covey list or price), F. O. B., $208.

(8) 1 Drier for drying the washed fruit to be about 60 feet long and having an estimated capacity in normal weather of over three cars per day, $1,100.

All the above work shall be done in a first class manner and the materi*l*s shall be suitable for the proper *instalation* of the work in every way.

IN CONSIDERATION of the premises and the

faithfull and proper performance of the herein above mentioned work by the **[192]** said George D. Parker the McPherson Heights Citrus Assn. agrees to pay to the said George D. Parker the above specified sums upon the completion of the said work.

WITNESS our hands and seal the year and day first above written.

McPHERSON HEIGHTS CITRUS ASSN.

[Seal] K. E. WATSON,

Pres.

CLATE STANFIELD,

Sec.

GEORGE D. PARKER. **[193]**

[Letter, 10–9–12, Parker Machine Works to Edmun Peycke Co.]

10–9–12.

Edmun Peycke Co.

Los Angeles, Cal.

Gentlemen:—

As requested by Mr. Buffington we submit the following for the equipment of the Upland House:

One full std. Sizer complete with distributing belt, etc.	$425.00
One ½ std. Sizer complete with distributing belt, etc.	285.00
One elevator from the basement to main floor with provision to feed from either floor	140.00
One three run 6 foot brushing machine	240.00
One change speed for feed and sorting table	40.00

One roller sorting table. 3 grades.....	225.00
One 5 H. P. motor.....	72.00
One two man plain top box press with strapping attachment to line shafts, hangers, pulleys, belting, and labor attaching and connecting up the above machines	160.00
	66
	$1,676.00

This is based upon good work and material throughout in every respect as we have been doing our work.

We are resp. yours,

PARKER MACHINE WORKS.

GEO. D. PARKER. **[194]**

[Agreement, October 20, 1911, Between Pattee & Lett Co. and George D. Parker.]

THIS AGREEMENT, made and entered into this 20th day of October, 1911, between Pattee & Lett Co., of Riverside, Cal., and George D. Parker, of Riverside, California.

WINESSETH: That the said George D. Parker, agrees to perform the following work in the packing-house of Pattee & Lett Co. at Casa Blanca, California.

1st. To install complete ready for the power One (1) full Parker No-Drop Sizer, with bins Thirty-four (34) feet long, for the sum of Four Hundred, Twenty-five Dollars ($425).

2d. Any extra labor and material not specified, to be installed by the day, and to be charged at the usual rate for such work.

All of the above work, shall be performed in a workmanlike manner and the materials used are to be suitable in every way to complete said work, to the satisfaction of first party.

It is further agreed that the party of the second part shall protect the party of the first part, against any royalties that may be collected to the amount of One Hundred Dollars ($100) for each full sizer.

IN CONSIDERATION of the premises, and of the faithful and proper performance of the herein above-mentioned work by the said George D. Parker, Pattee & Lett Co., agrees to pay the said George D. Parker the sum of Four Hundred Twenty-five Dollars ($425), together with any extra work, upon completion of the said work.

This work to be completed on or about November 25th, 1911.

WITNESS our hands and seal the day and year first above written.

PATTEE & LETT COMPANY.

Witness: By W. P. LETT,

Mn'gr. **[195]**

[Agreement, Between Benchley Fruit Co. and George D. Parker.]

THIS AGREEMENT, made and entered into this —— day of ——, 191—, between The Benchley Fruit Co. of Fullerton, Cal., and George D. Parker,

WITNESSETH: That the said George D. Parker

agrees to perform the following work in the house of The Benchley Fruit Co., at Placentia, Cal.

1st.	To install one full sizer with 34–0″ bins installed ready for the power..	$425.00
	One ¼ sizer 15–0″ long bins on one side 18–0″ long	195.00
2d.	One elevator and dumper combined..	75.00
	One sorting belt with 16″ belt and one 12″ or two 6″ belts, same to be 12 feet long	145.00
3d.	Belting, shafting & pulleys.....	145.00
	Making a total....$965.00	

4th. All of said work shall be performed in a workmanlike manner and the materials used in said work shall be of the best, and said work shall be completed on or before the —— day of ——, 191—.

In consideration of the premises and of the faithful and proper performance of the hereinabove mentioned work by the said George D. Parker, and of the deposit by the said George D. Parker with The Benchley Fruit Co., of a sufficient bond of indemnity in the sum of $200, to indemnify the said Benchley Fruit Co., against any royalty which may be awarded to Fred Stebler or his assignee through any infringement of patents on the above sizers, in suit now pending, or any appeals from same, The Benchley Fruit Co. agrees to pay the said George D. Parker, the sum of $965, on completion of said work.

WITNESS OUR HANDS the day and year first above written.

_____

_____ [196]

Schedule of Sales of Parker Sizers, Including Adjustable Bins, Distributing Systems and Cost of Installation.

Selling Price for Whole Sizer, With Adjustable Bins, Distributing System and Cost of Installation $425.

Selling Price for ½ Sizer, With Adjustable Bins, Distributing System and Cost of Installation $285.

Parties to Whom Sold.	No. of Whole Sizer Sold.	No. ½ Sizer Sold.	Amount Sold for, Including Adjustable Bins, Distributing System, and Installation.
Fernando Fruit Growers' Assn.	1		$ 425
San Dimas Orange Growers' Assn.	5		2125
Claremont Citrue Anna.	1		425
El Camino Citrus Assn.	2		850
El Camino Citrus Assn.		2	570
West Ontario Citrus Assn.	1		425
Riverside Heights Packing Assn.	5		2000
Riverside Heights Packing Assn.		1	285
El Ranchito Citrus Assn.	1		425
El Ranchito Citrus Assn.		1	285
Whittier Citrus Assn.	2		850
A. Duffill Assn.	1		425
Sierra Madre Lamanda Citrus Assn.	1		425
Sierra Madre Lamanda Citrus Assn.		1	285
McPherson Heights Citrus Assn.	2		850
Orange Heights Fruit Assn.	1		425
Orange Heights Fruit Assn.		1	285
Covina Orange Growers' Assn.	1		425
			$11785

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Parties to Whom Sold.	No. of Whole Sizer Sold.	No. ½ Sizer Sold.	Amount.
			11785
Pomona Fruit Growers' Exchange.	5		$2125
Pomona Fruit Growers' Exchange.		1	285
Walnut Fruit Growers' Assn.	1		425
Walnut Fruit Growers' Assn.		1	285
W. H. Jameson Fruit Co.	1		425
W. H. Jameson Fruit Co.		1	285
Elephants Orchards.	1		425
La Verne Orange Growers' Exchange.	1		425
La Habra Citrus Assn.	1		425
Placentia Orange Growers' Assn.	1		425
El Cajon Citrus Fruit Assn.	1		425
E. M. Ross Assn.	1		425
Colton Fruit Exchange.	3		1275
Indian Hill Citrus Assn.	1		425
Edmund Peycke Co.	2		850
Edmund Peycke Co.		1	285
A. Denman & Son.	1		425
Redlands Orange Growers' Assn.	2		850
Redlands Orange Growers' Assn.		2	570
Redlands Heights Orchards.	2		850
Antelope Heights Orange Assn.	2		850
Randolph Fruit Company.	1		425
Schwan & Bealey Company.	1		425
Walter Hill Company.	1		425
Chase & Company.	2	Omitted by mistake	$425
L. B. Skinner & Company.	2	" " " (In pencil)	$425
Benchley Fruit Company.	1		425
Pattee & Lett.	1		425
			$26670

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Parties to Whom Sold.	No. of Whole Sizer Sold.	No. ½ Sizer Sold.	Amount.
			26670
L. V. W. Brown.	2		$850
Anaheim Orange Growers' Assn.	2		850
C. Lyons & Son.	2		850
C. C. Chapman.	2		850
C. C. Chapman.		1	285
W. T. Henderson & Sons.	1		425
San Pedro, Los Angeles & Salt Lake R. R.	2		850
Baldwin Estate.	2		850
	72	13	$32480

Total amount received for 72 Whole Sizers, including adjustable bins, distributing system and installation @ 425 ..... $28,775.

Cost of 72 Whole Sizers, adjustable bins, distributing system and installation @ $356.52 per sizer..... $25,669.44

3,105.56

Profit, $3,105.56

Total amount received for 13½ sizers, including adjustable bins, distributing system and installation @ 285..... $ 3,705

Cost of 13½ sizers, including adjustable bins, distributing systems and installation, @ 228.10 per sizer..... $ 2,965.30

739.70

Profit, $739.70

Total, $3,845.26

Less deduction allowed by Master on proportion of overhead expense as per statement F, Omitted from p. 2..$1,800
Less cash.... 1,426.08

$373.92

373.92

$4,219.18

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Statement B.

MATERIAL FOR SIZERS.

4	2″ x 4″ x 20′ rest for roll stands	4.20
2	2″ x 4″ x 20′ cap for chain rail	1.89
72	lin. ft. ¼″ x ¾″ hard wood guide for chain	1.50
4	1″ x 5½″ x 20′ belt rest	2.80
4	1″ x 4½″ x 20′ belt rest	2.10
20	2″ x 4″ x 28″ base for roll stands	2.17
22	2″ x 3″ x 14″ upper rafter posts	.91
11	2″ x 6″ x 24″ upper rafter	1.54
2	2″ x 4″ x 51″ drum posts for extension	.63
1	2″ x 3″ x 16′	.56
1	1″ x 12″ x 16″	1.12
2	2″ x 4″ x 48″ drum posts on drive end	.56
2	drums drilled	13.60
2	sprockets	5.60
2	S–6, 1 3/16″ take-up boxes	4.80
2	1 3/16″ bracket boxes	4.80
22	Roll stands with fruit guides	50.00
3	14″ return belt rollers with boxes	2.25
1	39-tooth 1 3/16″ #45 drive sprocket	2.80

4	ft. 1 3/16″ shaft	.60
3	ft. 1″ shaft	.32
180	ft. 7″ cotton belt	27.54
85	ft. #45 chain	6.37
30	K–5 #45 attachment links	.69
2	lbs. nails	.08
20	3″ #16 screws	.30
40	3/8″ x 2″ carriage bolts	.40
20	3/8″ x 2½″ bolts with wing nuts	.60

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6	3/8″ x 4½″ carriage bolts	.18
4	3/8″ x 5½″ carriage bolts	.12
16	3/8″ x 3½″ carriage bolts	.10
5	days labor erecting @ $4 per day	20.00
	Freight and drayage	4.90
	Traveling expenses	7.90
		173.93

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Statement C.

MATERIAL FOR ADJUSTABLE BINS AND DISTRIBUTERS.

20	2″ x 3″ x 37″ outside legs	2.10
20	2″ x 3″ x 34″ inside legs	2.03
20	rafters 2″ x 4″ x 50″	3.85
8	1″ x 1¾″ x 18″ floor rails	1.68
10	1″ x 3″ x 60″ braces	.84
4	1″ x 3″ x 72″	.42
4	2″ x 6″ x 16″ canvas rail	4.48
4	2″ x 6″ x 20′ CANVAS rail	5.60
2	2″ x 6″ x 16′ board iron rail	2.24
2	2″ x 6″ x 20′ board iron rail	2.80

2	1″ x 1″ x 16′ rail for board irons)	
2	1″ x 1″ x 20′ rail for board irons)	.72
2	2″ x 4″ x 16′ rest for cull belt	1.47
	2″ x 4″ x 20′ rest for cull belt	1.90
70	lineal ft. 1″ x 1½ rounded cull b. r'l	1.05
3	1″ x 12″ x 20′ for sides and ends	2.70
2	1″ x 12″ x 16′ for sides and ends	2.24
4	1¼ x 12″ x 18′ stepping for cull belt	4.68
70	lin. ft. of resaw 1½″ x 8″	2.70
70	lin. ft. 1″ x 2″ rounded for cull b	.84
6	⅝″ x 9″ suspension rods	2.64
8	2″ x 3″ x 18′ cull belt posts	.42
18	1″ x 12″ x 39″ partition boards	4.20
4	8″ x 3″ x 1″ wood pulleys	4.90
2	6″ x 3″ x 1″ wood pulleys	2.20
8	S–3 1″ boxes	2.40
23	yds. 48″ canvas	15.41
8	yds. 36″ canvas	1.36

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140	ft. 3″ cotton belt	12.32
23	yds. carpet lining	.92
1	roll car lining paper	1.25
½	roll 1″ mesh chicken wire 36″	2.35
25	lbs. moss	1.75
18	board irons	2.70

(Continued)

C

MATERIAL FOR ADJUSTABLE BINS AND DISTRIBUTERS.

2½	lbs. staples	.12
2½	lbs. tacks	.25
6	lbs. nails	.24

2 gro. 1½ #10 screws	.50
1 gro. 2″ #10 screws	.30
8 ⅜″ x 4″ carriage bolts	.12
	$100.69
16 days labor—@ 4 per day	.64.
Freight and expense drayage	10.00
	$174.69
Traveling expenses	7.90
	$182.59

[203]

Statement D.

MATERIAL, LABOR AND EXPENSE FOR INSTALLATION OF ONE ½ SIZER.

2 2″ x 4″ x 20′ rest for roll stands	$2.10
2 2″ x 4″ x 20′ cap for chain rail	1.89
72 lin. ft. ¼″ x ¼″ hard wood guid for chain	1.50
2 1″ x 5½″ x 20′ belt rest	1.90
2 1″ x 4½″ x 20′ belt rest	1.05
10 2″ x 4″ x 28″ base for roll stands	1.09
22 2″ x 3″ x 14″ upper rafter posts	.91
11 2″ x 6″ x 18″ upper rafter	1.15
2 2″ x 4″ x 51″ drum posts for extension	.63
1 2″ x 3″ x 16′	.56
1 1″ x 12″ x 16″	1.12
2 2″ x 4″ x 48″ drum posts on drive end	.56
2 ½ drums drilled	6.80
2 sprockets	5.60
2 S–6,1 3/16″ take-up boxes	4.80
2 1 3/16″ bracket boxes	4.80

10	roll stands with fruit guiders	25.00
3	14″ return belt rollers with boxes	2.25
1	39-tooth 1 3/16″ #45 drive sprocket	2.80
4	ft. 1 3/16″ shaft	.60
3	ft. 1″ shaft	.32
90	ft. 7″ cotton belt	14.27
85	ft. #45 chain	6.37
30	K-5 #45 attachment links	.69

[204]

2	lbs. nails	.08
20	3″ #16 screws	.30
20	3/8″ x 2″ carriage bolts	.20
10	3/8″ x 2½″ bolts with wing nuts	.30
6	3/8″ x 4½″ carriage bolts	.18
4	3/8″ x 5½″ carriage bolts	.12
16	3/8″ x 3½″ carriage bolts	.10
		$90.04

(Continued)

2

STATEMENT D, CONTINUED.

		90.04
5	days labor erecting	20.00
	Freight and drayage	4.00
	Traveling expenses	2.00
		$116.04

[205]

Statement E.

COST OF MATERIAL, LABOR AND EXPENSE OF INSTALLING ADJUSTABLE BINS AND DISTRIBUTORS FOR ONE ½ SIZER.

10	2″ x 3″ x 37″ outside legs	1.05
20	2″ x 3″ x 34″ inside legs	2.03
20	Rafters 2″ x 4″ x 50″	3.85
4	1″ x 1½″ x 18″ floor rails	1.34
5	1″ x 3″ x 60″ braces	.42
2	1″ x 3″ x 72″	.21
2	2″ x 6″ x 16″ canvas rail	2.24
2	2″ x 6″ x 20′ canvas rail	2.80
1	2″ x 6″ x 16′ board iron rail	1.12
1	2″ x 6″ x 20′ board iron rail	1.40
1	1″ x 1″ x 15′ rail for board irons)	
1	1″ x 1″ x 20′ rail for board irons)	.36
1	2″ x 4″ x 16′ rest for cull belt	1.24
1	2″ x 4″ x 20′ rest for cull belt	1.45
35	lineal ft. 1″ x 1½ rounded cull b. r'l	.52
	1″ x 12″ x 20″ for sides and ends	1.35
	1″ x 12″ x 16″ for sides and ends	1.12
2	1¼ x 12″ x 18′ stepping for cull belt	2.34
36	lin. ft. of resaw 1¼″ x 8″	1.35
36	lin. ft. 1″ x 2″ rounded for cull b	.42
3	⅝″ x 9″ suspension rods	1.32
4	2″ x 3″ x 18″ cull belt posts	.21
9	1″ x 12″ x 39″ partition boards	2.10

[206]

2	8″ x 3″ x 1″ wood pulleys	2.45
1	6″ x 3″ x 1″ wood pulleys	1.10
8	S–3 1″ boxes	2.40

12 yds. 48″ canvas	7.70
4 yds. 36″ canvas	.68
70 ft. 3″ cotton belt	6.16
12 yds. carpet lining	.46
	$46.27

2

STATEMENT E, Continued.

	$46.27
½ roll car lining paper	.63
¼ roll 1″ mesh chicken wire 36″	1.18
12½ lbs. moss	.88
9 board irons	1.35
1¼ lbs. staples	.06
1¼ lbs. tacks	.13
3 lbs. nails	.12
1 gro. 1½ #10 screws	.25
½ gro. 2″ #10 screws	.15
8 ⅜″ x 4″ carriage bolts	.12
12 days labor	48.00
Freight and expenses	8.00
	$112.06

[207]

Statement F.

OVERHEAD EXPENSES FROM SEPTEMBER 30, 1909, TO MARCH 10, 1913.

Office expenses	$6,089.03
Stockroom and shipping	5,053.40
Advertising	848.98
Light, Power and Heat	1,431.89

Insurance March 23, 1911 to March 25, 1913		662.77
Machinery upkeep		1,486.14
Shop expense (foreman) 3½ years at $1200 per year		4,200.00
Depreciation on machinery 10%		
Value $12,152.95, per year $121.52 for 3½ years		425.32
Interest on investment:		
Machinery	$12,152.95	
Buildings and Real Estate	12,230.00	
Patterns	5,946.97	
	$30,329.92 at 6% per year,	
	$ 1,819.79 for 3½ years	6,369.36
	Total	$26,567.89

[208]

[Endorsed]: C. C. 1562. Filed Jul. 29, 1914, at 30 min. past 9 o'clock A. M. Lynn Helm, Referee. C. Meade, Clerk. Statement. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [209]

[Complainant's Exhibit No. 1.]

ITEMIZED STATEMENT OF MACHINE WORK AND MATERIAL FOR DRUM, S–6 TAKE–UP BOX, SPROCKET, ROLL STAND COMPLETE AND S–8 BRACKET BOX.

DRUM:

Castings 110#	4.95	
5 3/8 x 3 machine bolts	.07	
1 pc. 1 3/16 x 23″ C. R. Steel 7½#	.34	
1 key 5/; 6 x 5/16 x 3″	.05	
2 ½ x ¾ set screws	.03	
Labor	1.53	
		$6.97

TWO S–5 and 6 BRACKET BOXES.

Castings 18½#	.89	
2 ½ x 9 bolts	.05	
2 lbs #4 babbit	.13	
Labor	.45	
		$1.52

SPROCKET

Casting 32#	1.44	
2 ½ x 1 set screws	.03	
Labor	.72	
		$2.19

TWO S–7 and 8 BRACKET BOXES.

Casting 25#	1.13	
2 lbs. #4 babbit	.13	
Labor	.54	
		$1.80

[210]

SIZER STAND.

Steel frame 5#	.18	
Maple roll 3 x 3 x 20″	.14	
1 pc. 2. x 3 x 2′ *O″* O. P.	.05	
2 ¼ x 3 cap screws	.03	
4 3/16 x ¾ rivets)		
2 ¼ nuts)	.03	
4 connecting rods 1#	.04	
2 guide castings 1#	.05	
1 thumb nut, special	.02	
2 adjusting levers 1#	.05	
Labor	1.73	
		$2.32

Diff $11.28 whole sizer .....
" 9.48– ½ " .....

14.80

U. S. District Court, No. 1562. Complns Exhibit No. 1. Filed Aug. 6, 14. Helm, Master. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [211]

[Complainant's Exhibit No. 2.]

SCHEDULE OF SALES OF CALIFORNIA IMPROVED SIZERS, INCLUDING ADJUSTABLE BINS, DISTRIBUTING SYSTEMS AND COST OF INSTALLATION.

Selling Price for Whole Sizer, with Adjustable Bins, Distributing System and Cost of Installation $400.

Selling Price for ½ Sizer, with Adjustable Bins, Distributing System and Cost of Installation $285.

Parties to Whom Sold.	No. Whole Sizers Sold.	No. ½ Sizers Sold.	Amount Sold for, Including Adjustable Bins, Distributing System, and Installation.
Pasadena Orange Growers' Assn.	2		$800.00
Pasadena Orange Growers' Assn.		1	285.00
Placentia Orange Growers' Assn.	1		400.00
Benchley Fruit Company.	1		400.00
Golden Orange Groves, Inc.	2		800.00
Mountain Slope Cit. Groves, Inc.	1		400.00
Covina Heights Groves, Inc.	2		800.00
Placentia Mutual Orange Assn.	1		400.00
Bradbury Packing House.	2		800.00
Fullerton Mutual Oronge Assn.	1		400.00
Villa Park Orchards Assn.	3		1,200.00
La Habra Citrus Assn.	1		400.00
McPherson Heights Citrus Assn.	1		400.00
Placentia Mutual Orange Assn.		1	300.00
	18	2	$7,785.00

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. U. S. District Court, No. 1562. Complt's Exhibit No. 2. Filed Aug. 6, 14. Helm, Referee. [212]

[Complainant's Exhibit No. 3.]

Schedule of Sales of New Roles for Parker Sizers.

Selling price for whole set $50.00.
Selling price for one-half set $25.00.

Parties to Whom Sold.	No. Whole Set Sold.	No. Half Sets Sold.	Amount Sold for, Including Installation.
Anaheim Orange Growers' Assn.	2		$100.00
Anaheim Orange Growers' Assn.		1	35.00
Riverside Heights O. G. Assn.	2		none
Riverside Heights O. G. Assn.	2		100.00
Redlands Heights Orchards.	1		50.00
Redlands Heights Orchards.		1	25.00
I. L. Lyon & Sons.	1		50.00
I. L. Lyon & Sons.		1	25.00
Elephant Orchards.	1		50.00
	9	3	$435.00

Twenty Rolls for each whole set.

Ten Rolls for each half set.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. U. S. District Court, No. 1562. Complt's Exhibit No. 3. Filed Aug. 6, 14. Helm, Referee. [213]

[Complainant's Exhibit No. 4.]

[In pencil:] Parker Modified. California Improved Sizer.

MATERIAL FOR SIZERS, LABOR AND EXPENSE OF INSTALLATION.

90 ft. 14″ 4–ply cotton belt.....	30.33
20 sizing rolls complete.....	13.84
1 40–tooth sprocket #45 chain.....	1.95
22 pcs. 2x3x11¼″ posts for upper rafters..	1.25

11	" 2x6x2′ 7″ upper rafters	2.47
4	" 1x10x20″ 0′ belt rest	4.80
2	" 2x4x4′ 4″	.30
2	" 2x6x4′ 4″	.50
2	" 1x4x8′ 0″	.33
1	pc. 1x12–16′ 0″	.96
2	drums	15.30
2	S–6 take-up boxes	1.39
2	S–8 bracket boxes	1.12
3	return belt rollers and boxes	2.25
20	S–18 roll bearings	1.78
20	S–19 base and stand	3.53
2	S–25 end bearings and base	.09
2	S–26 end bearings	.30
2	S–13 bevel gear brackets	.43
2	S–24 bevel gear bearings	1.23
3	1 3/16″ set collars	.42
4	1″ dolly boxes	1.36
35	belt lugs	.55
20	pcs. ½x½x4″ key stock	.30
2	" 1 3/16″x26″ C. R. shaft	1.44
1	pc. 1″x48″ C. R. steel shaft	.48
2	pcs. 1″x25″ do.	.49
4	5″ mitre gears	1.59
16	⅜x4½ carriage bolts	.19
[214]		90.97
	Footing page 1	90.97
20	⅜x5 carriage bolts	.24
6	⅜x7½ do.	.07
4	⅜x6½ do.	.06

4	3/8x4 lag screws	.06
70	1/4x3/4 wagon box rivets	.13
30	inches #11 Bristol belt lacing	.22
	Labor erecting	20.00
	Expense	3.95
	Freight and drayage	8.50
		$124.20

[215]

[In pencil:] For California Improved Sizer.

COST OF MATERIAL, LABOR AND EXPENSE OF INSTALLING ADJUSTABLE BINS AND DISTRIBUTORS FOR ONE SIZER.

10	pcs. 2x4x8′ 2″ cross bar	3.60
18	bin boards 1x12x3′ 6″	5.13
20	pcs. 2x4x4′ 4″ rafters	3.70
20	" 2x4x2′ 6″ legs	2.64
12	" 1x3x6′ 4″ braces	6.88
4	" 2x3x3′ 1½″ corner legs	.65
4	" 2x6x20′ canvas rail	4.40
4	" 2x6x16′ do.	3.52
2	" 2x6x20′ partition board r'l	2.20
2	" 2x6x*16″ 0″* do.	1.77
4	" 2x3x4′ 10″ end rail	.29
6	" 2x3x1′ 2″ for holding idler	.35
2	" 1x1x20′ for holding bin board irons	.18
2	" 1x1x16′ do.	.14
2	" 1x12x20′ side board for bin	2.40
1	pc. 1x12x20′ end board for bin	1.20
2	pcs. 1x12x16′ side board for bin	2.12
1	pc. 1x6x20′ finish board for bin	.50
2	pcs. 1x1¾x20′ floor rail	.38

2	" 1x1¾x16′ do.	.30
8	" 2x3x1′ 6″ posts for belt	.29
4	" 1x3x20′ belt rest	1.00
4	" 1x3x16′ do.	.80
6	" 1x1⅛x12′ belt rail	.45
4	" 1x2x18′ side board for belt	.72
4	" 1x6x18′ shelf for belt	2.16
	Drayage on above lumber	.85
		48.62

[216]

	Footing page 1	48.62
140	ft. 3″ 3–ply cotton belt	7.56
8	supports for cull belt	.88
1	roll car lining paper	1.25
18	partition board irons	2.25
14	S–14 irons for bins	2.84
2	S–16 irons for bins	.60
8	S–3 1″ boxes	.88
4	8x3x1 iron pulley	2.93
22⅔	yds. 42″ canvas	12.35
24	yds. 36″ canvas	3.96
½	roll 36″ wire netting	2.23
24	yds. carpet lining	.96
16	⅜x4½ carriage bolts	.09
2	⅜x5½ do.	.03
2	⅜x2½ do.	.04
2	⅜x6 do.	.03
60	¼x1½ stove bolts	.23
24	2″ #14 wood screws	.07
1	gro. 2″ #10 do.	.22
1	" 1½ #10 do.	.18

6 lbs. 6d finish nails	.18
5 " 20d nails	.15
1 lb. 4d do.	.04
2 lbs. 8d. do.	.08
2 lbs. 8d common	.06
2½ " tacks	.25
2½ " staples	.12
20 " sea moss	1.20
2 " ⅜" cut washers	.14
1 lb. ½" do.	.06
	90.46

[217]

Footing page 2	90.48
20 ⅜x6 carriage bolts and washers	.30
labor assembling body frame and rafters	1.50
labor erecting	52.00
expense	10.27
freight	.75
Total	$155.28

[218]

[In pencil:] Calif. Imp. Sizer.

COST OF MATERIAL, LABOR AND EXPENSE OF INSTALLING ONE HALF SIZER.

1 pc. 2x3x11¼" legs	.57
1 " 2x6x18" upper rafter	1.85
2 pcs. 1x10x20' belt rest	2.40
4 " 1x3x20' holding belt	1.00
2 " 2x4x4' 4" drum stand	.30
2 " 2x6x4' 4" do.	.50
1 pc. 1x12x12' feed end of sizer	.72

2	pcs. 1x4x8′ do.	.23
2	half drums	7.65
2	S–6 boxes	1.39
2	S–8 boxes	1.12
35	belt lugs	.55
1	S–13 gear bracket	.22
1	S–24 gear bearing	.62
1	S–25 end bearing	.05
1	S–26 do.	.15
3	10–in. belt rollers and boxes	2.25
10	S–18 roll bearings	.89
10	S–19 base and stand	1.77
10	pcs. ½x½x4 key stock	.23
4	1″ dolly boxes	1.36
3	1 3/16 set collars	.42
2	pcs. 1 3/16x20 shaft	.57
1	pc. 1x36″ shaft	.34
1	pc. 1x25″ “	.24
2	5″ mitre gears	.80
1	40–tooth sprocket	1.95
10	sizing rolls	6.92
15	in. Briston belt lace	.11
8	⅜x4½ car. bolts	.09
10	⅜x5 do.	.12
4	3.8x7½ do.	.04
		37.42

[219]

	Footing page 1	37.42
2	⅜x4 lag screws	.03
2	⅜x6½ carriage bolts	.03
2	⅜x6 do.	.03

90	ft. 8″ 4–ply cotton belt	15.30
70	¼x¾ wagon box rivets	.13
	Labor erecting	16.00
	Expense	2.36
	Freight and drayage	6.95
	Total	$78.25

[220]

[In pencil:] California Sizer.

COST OF MATERIAL, LABOR AND EXPENSE OF INSTALLING ADJUSTABLE BINS AND DISTRIBUTORS FOR ONE HALF SIZER.

9	bin boards 1x12x3′ 6″	1.80
10	pcs. 2x4x4′ 7″ rafter	1.98
10	" 2x4x3′ 8″ legs	1.77
10	" 2x4x2′ 6″ do	1.61
10	" 1x3x4′ brace	.50
10	" 2x4x5′ cross-bar	2.43
2	" 2x3x3′ 1½″ legs	.30
2	" 2x6x20′ canvas rail	2.00
2	" 2x6x16′ do	1.60
1	" 2x6x20′ bin board rail	1.00
1	" 2x6x16′ do	.80
1	" 1x1x20′ board iron holder	.15
1	" 1x1x16′ do	.10
1	" 1x12x20′ side board for bins	1.20
2	" 1x12x16′ side rail	1.92
1	" 1x6x12 finish piece for end	.30
2	" 1x1¾x16′ floor rail	.40
2	" 1x1¾x20′ do	.52
4	" 2x3x18″ posts for bearings	.17

2	" 1x3x20′ belt rest	.50
2	" 1x3x16′ do	.30
3	" 1x1⅛x12′ side rail for belt	.45
2	" 1x3x18′ back for belt	.45
2	" 1x6x18′ table for belt	.90
	Labor assembling body frame and rafters	.75
	Drayage	.50
		$24.40

[221]

	Footing page 1	24.40
7	S–15 side arms	1.42
1	S–16 do	.30
4	S–3 1 3/16″ bearing	.44
2	8x3x1 iron pulleys	1.47
9	partition board irons	1.13
11⅓	yds. 42″ canvas	4.18
12	yds. 36″ canvas	1.98
¼	roll 36″ wire netting	1.12
12	yds. carpet lining	.48
½	roll car paper	.65
10	lbs. sea moss	.60
1½	lbs. ⅜″ cut washers	.10
½	lb. ½″	.03
10⅜x6	carriage bolts and washers	.15
8⅜x3½	car. bolts	.05
2⅜x5½	do	.02
4⅜x2½	do	.04
30¼x1½	stove bolts	.12
12	2″ 314 wood screws	.04
½	gro. 2″ # 10 do.	.11

½ " 1½ # 10	.09
4 lbs. 6 d finish nails	.12
3 " 20 d do	.09
½ lb. 4 d do	.02
2 lbs. 8 d do	.06
2 " 8 d common nails	.06
1½ lbs. tacks	.15
1½ " staples	.08
70 ft. 3" 3-ply cotton belt	3.78
	43.28

[222]

4 Brackets for belt	.44
Labor erecting	52.00
Expense	7.67
Freight	.50
	$103.89

[223]

[In pencil:] Calif. Improved Sizer.

Total amount received for 18 whole sizers, including adjustable bins, distributing system and installation.	$7,200.00	
Costs of 18 whole sizers, adjustable bins, distribution system and installation	5,030.64	Profit
	2,169.36	$2,169.36

Total amount received for 2 half sizers, including adjustable bins, distributing system and installation	585.00	
Cost of 2 half sizers, including adjustable bins, distributing system and installation	364.28	Profit
		220.72
	220.72	
Total amount received for 9 whole sets and 3 half-sets of rolls for Parker sizers	435.00	
Total cost of 9 whole sets and 3 half-sets of rolls for Parker sizers	374.56	
	60.44	Profit
		60.44
Total profits		$2,450.52
Less deduction allowed by master on proportion of overhead expense as per your statement. [224]		

OVERHEAD EXPENSES FROM APRIL 1, 1913 to JULY 1, 1914.

Office expenses	$1,583.07
Stockroom and drayage	1,037.85
Advertising	311.11
Light, power and heat	612.55
Insurance	443.76
Interest	651.20

Machinery up-keep	347.49
Shop expense (foreman)	1,359.19
Depreciation on machinery 10% value $7,899.43, per year $789.94 for 1 1/16 years	921.59
Interest on investment:	
Machinery $ 7,899.43	
Buildings and real estate 12,230.00	
Patterns 6,250.67	
$26,380.10 at 6% per year $1,582.80, for 1⅛ years	1,846.60
Total	$9,114.41

[Endorsed]: U. S. District Court No. 1562. *Complaint's* Exhibit No. 4. Filed Aug. 6, '14. Helm, ~~Referee~~ Master. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [225]

[Complainant's Exhibit No. 5.]

LIST OF PARTS FOR GRADER.

(23 ft. Grader for Belt Bin System.)

4 ft. of #34 sprocket chain at 4½¢	.18
18–3½x1x¾ iron pulleys at 11¢	1.98
1 socket wrench	.18
18 C. I. adjusting angles at 6¢	1.08
18 C. I. 1″ belt weights with pulleys at 12¢	2.16
2–¾″ shaft couplings at 22¢	.44
20–¾″ dolly boxes at 9¢	1.80
4–12″ rope sheaves at 37¢	1.48

4–4″ miter gears at 28¢ 1.12
2–1″ set collars at 8¢ ..... .16
2–¾″ set collars at 7¢ ..... .14
4–1″ bearings at 27¢ 1.08
1–1″ center bearing ..... .16
1–12″x3″x1″ iron pulley, 13# 1.27
36 C. I. roller ends at 3¢ 1.08
49 ft. ¾″ shaft, 4 pieces, 1½ lbs. per ft. 73½ at 3¾ 2.76
68 in. 1″ shaft, 3 pieces, 15 lbs at 3¾¢ ..... .56
101 ft. of ⅝″ grader rope (2) at 4½¢ 4.55
2–⅝″ rope couplings at 21½¢ ..... .43
46 ft. ⅝″ rope moulding on center rail at 2¢. .92
68 ft. 1″ leather belt at .048 per ft. 3.26
40 sq. ft. 2x3 O. P. S4S at 3½¢ 1.40
66 sq. ft. 2x4 O. P. S4S at 3½¢ 2.31
36–⅜x2″ set screws at 1¢ ..... .36
36–⅜″ Hex nuts tapped at 40¢ per C. ..... .15
36 C. I. roller arms 55# 1.45
11–⅜x12″ C. bolts at 2¢ ..... .22
[226]
6–⅜x3″ C. bolts at 70¢ per C. ..... .05
4–⅜x3 lag screws at 80¢ per C. ..... .03
16–⅜x5 lag screws at $1.04 per C. ..... .17
184–1½″ #12 F. H. wood screws at 19¢ per gross ..... .25
36–#5 screw eyes at 45¢ per gross ..... .12
20–#2 stag steel belt hooks at 75¢ per C. ..... .15
36–⅛″x¾″ cotter pins at 60¢ per M. ..... .03
26–2½″ #14 F. H. wood screws at 34¢ gross. .06
41 lineal ft. of 4x4 clear cedar for rollers, 54⅔ ft. at 35¢ 1.92, labor $1.65 ..... 3.57

7⅔ yds. of 22″ #6 canvas at 26½¢ per yd..	2.03
4⅕ sq. ft. hardwood for straddle blocks at .085.....	.36
40–1½″x#9 F. H. wood screws at 16¢ gross.	.05
Labor in shop assembling wood parts, 1½ days at 3.50.....	5.25
Labor outside erecting, 2 men 1 day and expenses at $5.00.....	10.00
Average freight 700 lbs. at 23¢.....	1.61
Cartage, both ends.....	1.00
2–14 P. #34 sprockets at 29¢.....	.58
Overhead expense 2% on selling price of $175.00.....	3.50
Total cost.....	$61.49

Overhead expense includes Office Supplies, Office Labor and Expense, Light, Power and Water, Taxes, Insurance and Depreciation on Buildings and Machinery.

Above selling price includes cull belts as per following cost list: **[227]**

150 ft. of 2½ cotton belt at .037 per ft.....	5.55
4–5½″ pulleys.....	1.00
9 bearings.....	.82
Lumber.....	2.00
Shaft, screws and bolts etc.....	.40
5 ft. of #32 chain at 4½¢.....	.23
3 hrs. shop labor at 35¢.....	1.05
2 hrs. erecting at 60¢.....	1.20
2 sprockets #32 at 20¢.....	.40
Total cost.....	$74.14

SHEET I. **[228]**

[Complainant's Exhibit No. 5.]

LIST OF PARTS FOR BELT DISTRIBUTING SYSTEM NOT INCLUDING GRADER.

150 feet of 24″ 3 ply cotton belt at .3971	59.06
300 sq. ft. of carpet padding at .009	2.70
24 yds. of 36″ #6 canvas at 43¢	10.32
8 yds. of 30″ 8 oz. canvas at 15¢	1.20
216 sq. ft. 36″ chicken wire, 1″ mesh, at .0127	2.76
6–1 3/16 set collars at 10¢	.60
4–1 3/16 dollin boxes at 13¢	.52
18 division board castings at 4¢	.72
1–30 p #45 sprocket	.70
1–7 p #45 sprocket	.23
4–1 3/16″ take up bearings	.69
46–#2 stagg steel belt hooks at 75¢ C	.35
8–½″x4½″ C. bolts at $1.60 C	.13
4–½″x5″ C. bolts at 1.75 C	.07
68–⅜″x4″ lag screws at 90¢	.61
28–⅜″x6″ " " at $1.14	.32
8–⅜″x3″ " " at 79¢ C	.07
1# of tacks	.11
1# of staples	.07
6 sash pulleys	.16
40–¼″ washers 1#	.10
20 ft. of #45 sprocket chain at 5¢	1.00
1–1 3/16″ shaft 6½ ft. long, 2–1 3/16″ shaft 30½ ft. long 11′ 7″=43½# at 3.75	1.63
4–14″x24″x1 3/16″ shop pulleys, 70 sq. ft. 2x8 O. P. S1S at 30¢—2.10—8 C. I. centers and labor $3.95	6.05

1 set (18) galv. iron guides, 46½# iron 2.54 solder 20¢, labor 1.30..... 4.04

[229]

2–3½x26″ idlers 6 sq. ft. lumber 18¢, labor 9¢ 2–½″ pins–3¢..... .30

4–½″ U. boxes C. I. at 2¢..... .08

1 set (18) wood guide holders, 12 sq. ft. lumber 36¢ Labor 3 hrs. at 35¢=1.05.. 1.41

1 set (24) slide boards, 48 sq. ft. Tex. pine =1.44 Labor 2½ hrs. at 35¢=88¢.... 2.32

1 set (28) rafters, 82 sq. ft. 2x4 S4S at .035=2.87 Labor 1 hr. 35¢..... 3.22

1 set (18) front legs of 2x3=21 sq. ft. at 3¢=.63 Labor 1½ hrs. at 35¢ .53..... 1.16

1 set (32) back legs of 2x=87 sq. ft. at 3¢=2.61 Labor 1 hr. 35¢..... 2.96

1 set (14) tie blocks 1½x2″, 5 sq. ft. lumber=15¢ Labor 1 hr. 35¢..... .50

1 set (18) division boards 1¼x12″=67½ ft. at 6¢..... 4.05

Labor 3 hrs. at 35¢..... 1.05

1 set (4) drum frames of 2x4=20 sq. ft. at 3¢ 60¢ Labor ½ hr. at 35¢=18¢..... .78

1 set (18) guide sticks 35 sq. ft. clear O. P. at 4½¢ 1.58 Labor 2½ hrs. at 35¢ .87. 2.45

8–1x12x18 deck boards Texas=144 sq. ft at 3¢..... 4.32

4–1¼x12x18 front boards, clear stepping 90 ft..... 540

4–1x8x18 back boards, clear 48ft. at 4½¢.. 2.17

164 lineal ft. 2x3 siderails, 82 sq. ft. at 3¢..... 2.46

1–1¼x14x20 front end boards, 30 sq. ft. at 6¢	1.80
4–drum braces 2x3x2 ft., 4 sq. ft. at 3¢=12¢ Labor ½ hr. 18	.30
8–drum brackets 4 sq. ft. 2x4 O. P. S4S at 3½¢=14 Labor ¼ hr. .09	.23

[230]

Packing and shipping, 3 hrs. at 30¢	.90
10 lbs. of nails at 3½¢	.35
2 days 2 men setting up at $10.00 per day	20.00
Average freight on 1300 lbs. at 23¢	2.99
Cartage both ends	1.50
Overhead expense 2% on selling price of $250.00	5.00
Total cost	$161.91

Overhead Expenses includes Office Supplies, Office Labor and Expense, Light, Power and Water, Taxes, Insurance and Depreciation on Buildings and Machinery.

Sheet II.

[Endorsed]: 1562. Complaint. Exhibit No. 5. Filed Aug. 6, 14. Helm, Master. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[231]**

[Affidavit of George D. Parker as to Statement of Earnings.]

United States District Court, Southern District of California, Southern Division.

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Appellees.

State of California,
County of Los Angeles,—ss.

George D. Parker, one of the above-named defendants, being duly sworn, deposes and says that the annexed constitutes a full, true and correct statement or account disclosing the number of machines called for by the subpoena of the Master herein, manufactured and sold by the said George D. Parker from the year 1909 up to and including the year 1913, and constitutes a true and accurate account of the cost of the said machines and the entire price for which the said machines were sold, and is a true and correct statement of the parties to whom the said machines were sold and of each and all of the sales made by the said George D. Parker as the manufacturer of said machines held to be an infringement of reissue letters patent No. 12,297, dated December 27, 1904. Said statement showing all the gains, profits or advantages made or received by him through the manufacture and sale of the said

infringing machines, and that the schedule of machines hereto attached constitute a total number of graders or sizers made an sold by the said George D. Parker, and includes therein all of the machines manufactured and sold by the said George D. Parker to his codefendant the Riverside Heights Orange Growers' Association, and that the contracts hereunto **[232]** annexed are all of the contracts signed by the purchasers of said infringing machines manufactured by George D. Parker, and which are in his possession at this time, and herewith marked F.

The statement hereunto attached marked Statement "A" is a full list disclosing each and every packing-house in which the infringing machines manufactured and sold by the said George D. Parker were installed.

The statement marked "B" constitutes a true and correct statement of the cost of material and labor and expenses for the building and installing of a full-size sizer.

The statement marked "C" constitutes a true and correct statement of the cost of the material and labor and expenses incident to the manufacture and construction of the bins and distributors supplied for a full-size sizer.

The statement marked "D" constitutes a true and correct statement of the cost of the material and labor and expense incident to the manufacture, construction and installation of a one-half size, and

The statement marked "E" constitutes a true and correct statement of the cost of the material and labor and expense incident to the manufacture, con-

struction and installation of the bins and distributors for a one-half sizer, and Statement "F" is a true statement of overhead expenses of plant.

GEO. D. PARKER.

Subscribed and sworn to before me this 28th day of July, 1914.

[Seal] CAROLINE E. SMITH,
Notary Public in and for the County of Los Angeles, State of California. **[233]**

THIS AGREEMENT, made and entered this 2 day of Oct. 1911, between Redlands Heights Orchards and George D. Parker of Riverside, Cal.,

WITNESSETH: That the said George D. Parker, agrees to perform the following work in the packing-house of Redlands Heights Orchards.

1st. To install, complete ready for the power, Two (2) Parker No-Drop Sizers @ Four Hundred Twenty-five Dollars ($425) each, making a total of Eight Hundred Fifty Dollars ($850). Any extra labor or material that may be needed to brace the roof, to support the cull belt or running-board, to be extra. The Sizers to have bins Thirty-four (34) feet long.

2d. Any extra labor and material not specified above to be charged at the usual rate for such work.

All of the above work, shall be performed in a workmanlike manner and the materials used, are to be suitable in every way to complete the said work.

IN CONSIDERATION of the premises, and of the faithful and proper performance of the herein

above-mentioned work by the said George D. Parker, Redlands Heights Orchards agrees to pay the said George D. Parker the sum of Eight Hundred Fifty Dollars ($850), together with any extra work, upon the completion of the said work, this work to be completed on or about November 1st, 1911.

WITNESS our hands and seal the day and year first above written.

GEO. D. PARKER.

REDLANDS HEIGHTS ORCHARDS,

A. D. KNIGHT, Mgr. **[234]**

In the United States District Court for the Southern District of California, Southern Division.

IN EQUITY—No. 1262.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION et al.,

Defendants.

Supplemental Statement of Riverside Heights Orange Growers' Association.

State of California,

County of Riverside,—ss.

H. D. French, being duly sworn according to law, deposes and *say* that he is the president of the Riverside Heights Orange Growers' Association, one of the defendants to the above-entitled action; that he

has examined the books of the company with the view of reporting any profit made by the said company by the use of the five (5) fruit-grading machines purchased from the codefendant, George D. Parker, and set forth in the statement heretofore filed, but has been unable to ascertain any profits made by the said Riverside Heights Orange Growers' Association by the use of the said fruit-grading machinery over and above the profit which would have been made by the said company through the use of the well-known California grader, the use of which was open to the Riverside Heights Orange Growers' Association at the **[235]** time of its purchase from the codefendant herein—George D. Parker—to the machines referred to in the statement heretofore filed on behalf of the Riverside Heights Orange Growers' Association, that the said Riverside Heights Orange Growers' Association has purchased from the said George D. Parker no other fruit-grading machines than the ones set forth in the statement heretofore filed; that the Riverside Heights Fruit Growers' Association did purchase from the said George D. Parker, after the granting of the Preliminary Injunction against the defendant—Riverside Heights Orange Growers' Association, a number of rollers, eighty (80) in number, and had the said George D. Parker remove each and every roller from the grading machines, purchased as heretofore set forth from the said George D. Parker, and substitute the new rollers for the ones in the machines previously purchased, the said new

rollers being properly positioned by the said George D. Parker in the previously purchased machines referred to in the statement heretofore filed, and connected one to the other in the same manner as the rollers of the California graders, that is to say, the series of rollers of each of the fruit graders were so connected as to be driven in unison from a single source of power in contradistinction to the independently driven and independently adjustable rollers embraced in the machines as originally supplied; that affiant from an examination of the books of the Riverside Heights Orange Growers' Association has been unable to ascertain or determine any profit derived from the new rollers purchased from the said George D. Parker.

H. D. FRENCH.

Subscribed and sworn to before me this 7th day of August, 1914.

[Seal] O. P. SANDERS,
Notary Public Riverside County, California.

[236]

State of California,
County of Riverside,—ss.

Henry D. French, being duly sworn, says: That he is the president and manager of the Riverside Heights Orange Growers' Association, a corporation engaged in the business of packing citrus fruits at Riverside, California; that the said association purchased from the Parker Machine Works of Riverside, California, on or about April 30th, 1910, one Parker sizer together with adjustable bins and cull

and distributing belts paying therefor the sum of $400 cash.

That on or about February 17, 1911, the said association purchased from the said Parker Machine Works one one-half Parker sizer with adjustable bins and cull and distributing belts paying for the same $285 cash.

That on or about October 1st, 1911, the said association purchased from the Parker Machine Works for the sum of $400 each, four Parker sizers with adjustable bins and cull and distributing belts.

That all these sizers were set up and installed in the packing house used by the said Riverside Heights Orange Growers' Association by the said Parker Machine Works the cost therefor being included in the price paid for the sizers as above stated.

HENRY D. FRENCH,
President and Manager,
Riverside Heights Orange Growers' Association.

Subscribed and sworn to before me this 28th day of July, 1914.

[Seal] O. P. SANDERS,
Notary Public in and for Riverside County, California. [237]

[Endorsed]: Filed Jul. 28, 1914, at 30 Min. Past 9 o'clock. Lynn Helm, Referee. A. M. C. Meade, Clerk.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association et al., Defendants.

Supplemental Statement of Riverside Heights Orange Growers' Association. Filed Aug. 7, 1914, at 40 Min. Past 5 o'clock P. M. Lynn Helm, ~~Referee~~, Master. L. H., Clerk. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [238]

[Defendant's Exhibit No. 1—January 7, 1905, California Iron Works to Riverside Heights Fruit Co.]

Riverside, California, Jan. 7, 1905.

M. Riverside Heights Fruit Co.

#10.

To California Iron Works, Dr.,

Manufacturers of Fruit Packers' Machinery.

General Machine-shop Work.

866 Vine Street. Foundry and Pattern Shop.

Telephone Red 502.

	Balance.....	74.40
Dec. 20.	2-36 Roller Graders, 157.00..314.	
	Extra for one more size in each mach., 10.00.....	10.00
		398.40

Check Feb. 16, 300.00.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

U. S. District Court No. 1562. Defendant's Exhibit No. 1. Filed Aug. 6, 1914. Helm, Referee.

Terms Net Cash on receipt of Invoice. All Bills not paid in ten days subject to sight draft. [239]

[Defendant's Exhibit No. 2—Letter September 12, 1912, California Iron Works to Redlands Fruit Assn.]

Wood Split Pulleys, Belting, Shafting, etc., Brush Machines, California Graders, Benchley Graders, Rope Graders.
Telephone Red 502.

Fred Stebler. A. A. Gamble.

California Iron Works,
Manufacturing Machinists and Iron and Brass Founders.
Supplies for Steam Plants, Pumping Plants and Irrigating Systems.
Manufacturers of Fruit Packers' Machinery.

Riverside, California, Sept. 12, 1914.

[In pencil:] 1 Machine, 157.50.

Redlands Fruit Assn.,
Redlands, California.

Gentlemen:

Noticing an item to the effect th*a* you expected to make some additional *improvments* this year, especially that you intended to add two additional graders, let us inquire if we cannot interest you in this at least. Remembering that the machine you got from us last year gave you reason for complaint and that in this we were probably at fault we would state that we are willing to correct this this season, free of charge, if it can be done early before the rush begins and we should also like to be able to furnish you with your new machines. We have a two-fold object in

this, one of which is to sell you a superior machine as we have made *improvments* this year and endeavored to correct the slight failures of the previous season, another object is to sell you a machine that you need have no fear of being interrupted in using later on, as you may have been previously advised of the letter's patent on fruit *gra* graders having individual adjustable rollers placed end to end, are in litigation at present but the prospects are before another season is over we will be declared the sole and rightful owners of this patent, *wh* which will place us in a position to at once enforce our rights not only with the manufacturers of these machines but the users as well, therefore we are taking some pains to impress this on the public at this time that it may be under-Garlock packing for high duty. The only packing that will hold crude oil. [240]

stood and thus perhaps save the so-called innocent purchaser form disagreeable *entanglments* or if not

that he may have none but himself to blame should he later not only be made defendant in a suit for damages besides finding his equipment suddenly tied up pending final adjustment,

We are now as we always have been guaranteeing our customers against any intereference against machines purchased from us and we choose to add that there is something back of this guarantee besides a mere assertion. Let us *herefore* quote you these machines, the two of them for $300.00, delivered and set up and fully guaranteed both as to rights to use and to perfect working order. If we can do this much for you it matters not to us who does the rest as we think it will be decidedly to your interest, otherwise we should not have been so persistent.

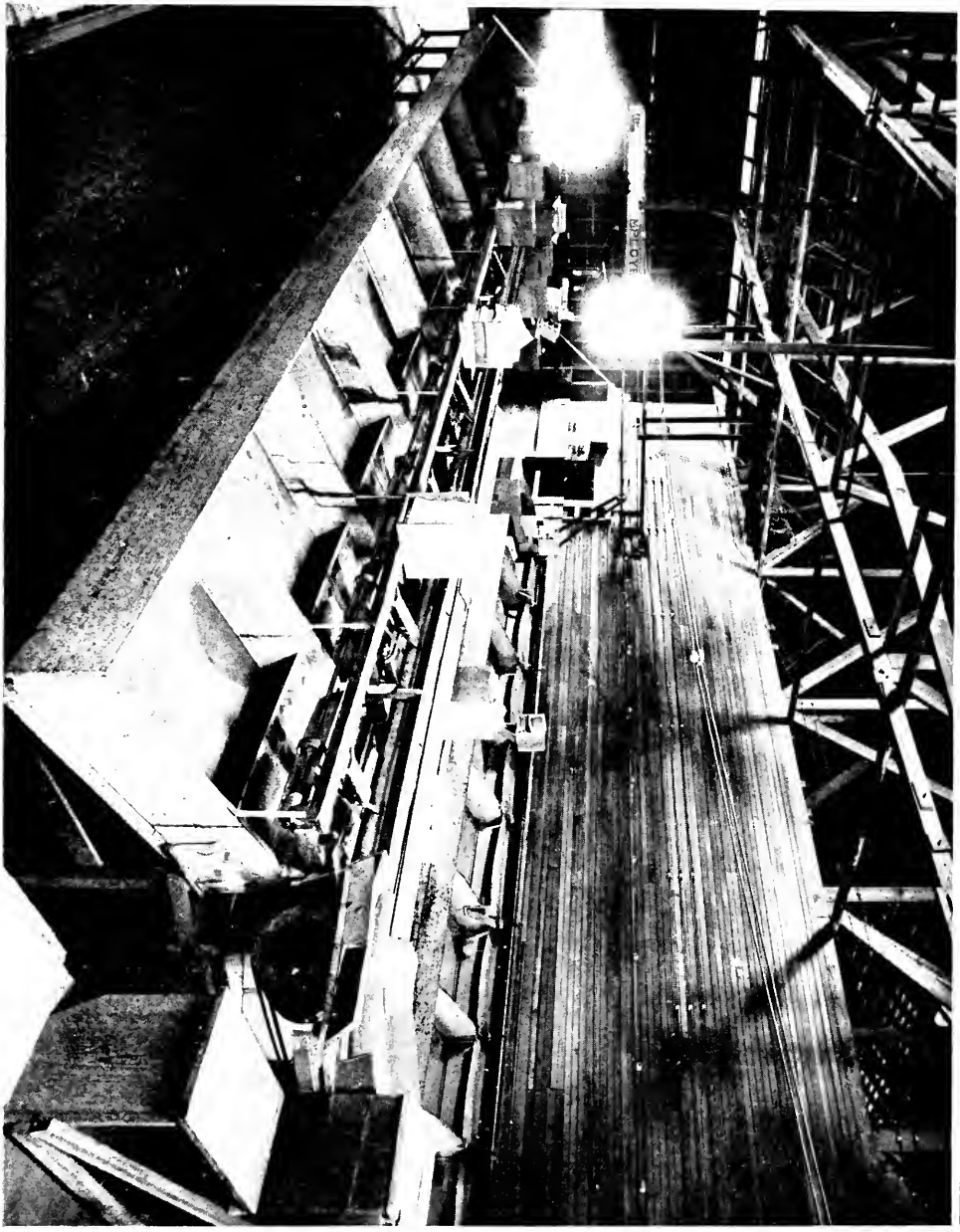
Trusting you will be able to consider this matter in the same light in which it is given, we remain,

Very truly yours,
CALIFORNIA IRON WORKS.
By F. STEBLER,
NB.

Garlock Packing for high duty. The only Packing that will hold crude oil.

No. 1562. Defendant's Exhibit No. 2. Filed Aug. 6, 1914. Helm, Master. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [241]

[Defendant's Exhibit No. 3.]



[Endorsed]: U. S. District Court. No. 1562. Defendant's Exhibit No. 3. Filed Aug. 7, 1914. ————, Master.

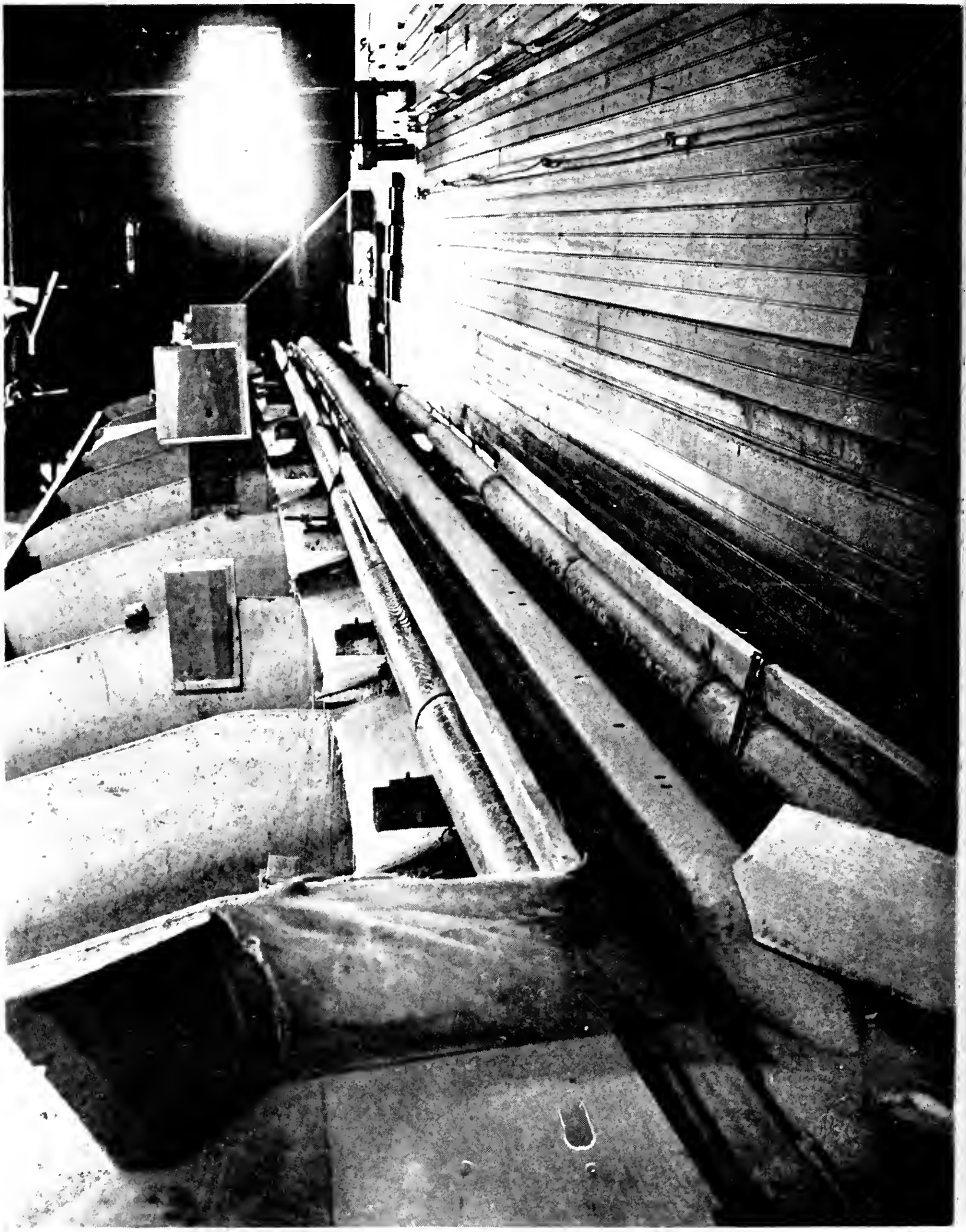
Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Defendant's Exhibit No. 4.]

[Endorsed]: U. S. District Court. No. 1562. Defendant's Exhibit No. 4, Filed Aug. 7, 1914. ————, Master.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Defendant's Exhibit No. 5.]



[Endorsed]: U. S. District Court. No. 1562. Defendant's Exhibit No. 5. Filed Aug. 7, 1914. ————, Master.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Defendant's Exhibit No. 6.]

[Endorsed]: U. S. District Court, No. 1562. Defendant's Exhibit No. 6. Filed Aug. 7, 1914. ————, Referee.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

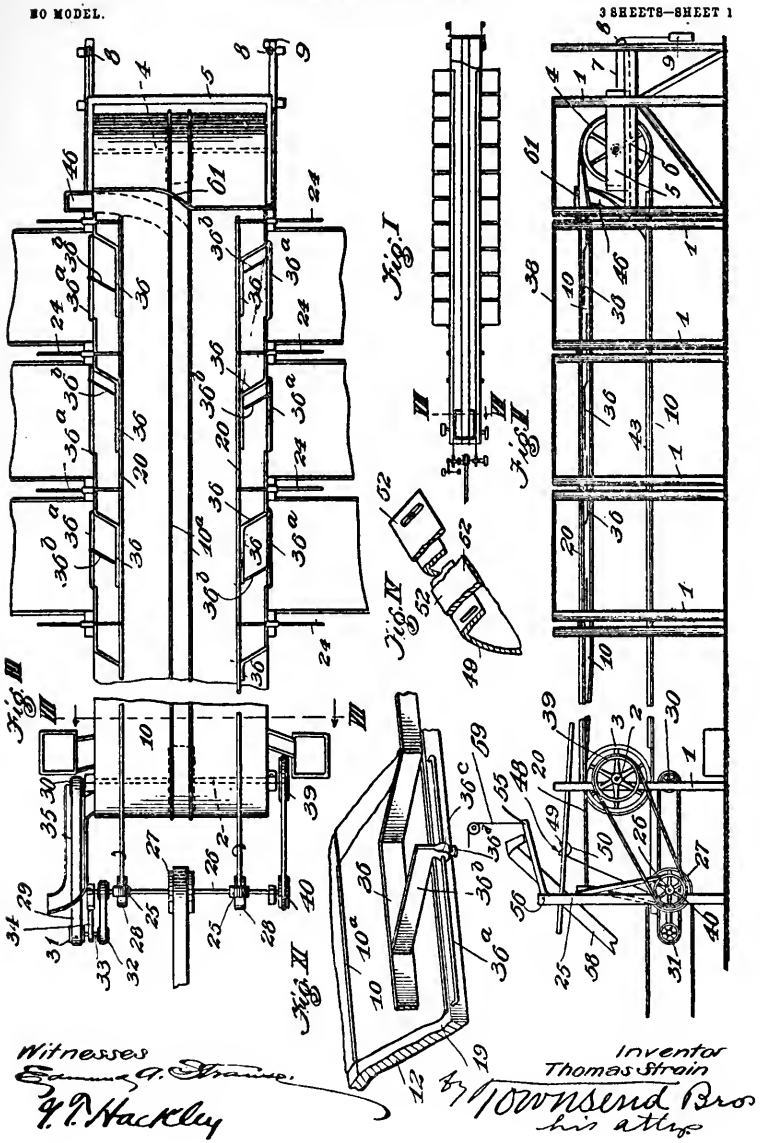
No. 775,015. PATENTED NOV. 15, 1904.

T. STRAIN.

FRUIT GRADER.

APPLICATION FILED JAN. 12, 1903.

NO MODEL. 3 SHEETS—SHEET 1



Witnesses
Edmund A. Strauss.
G. P. Hackley

Inventor
Thomas Strain
by Townsend Bros
his attys

No. 775,015. PATENTED NOV. 15, 1904.

T. STRAIN.

FRUIT GRADER.

APPLICATION FILED JAN. 12, 1903.

NO MODEL 3 SHEETS—SHEET 2

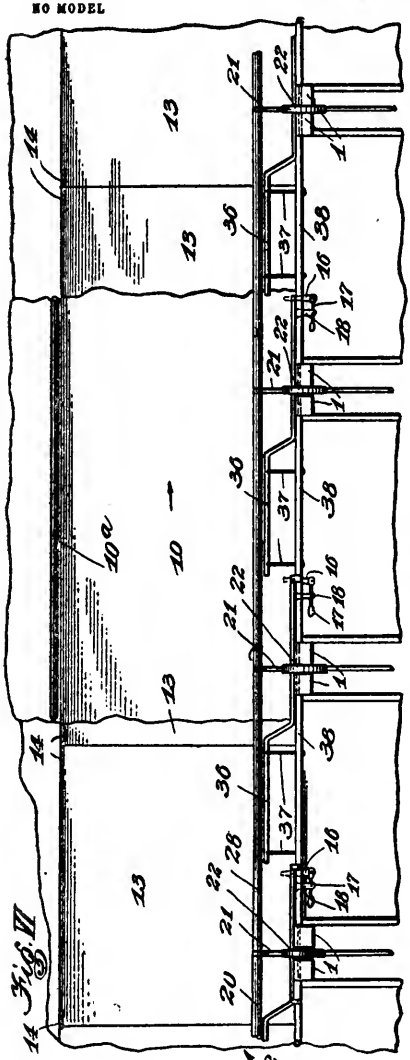


Fig. II

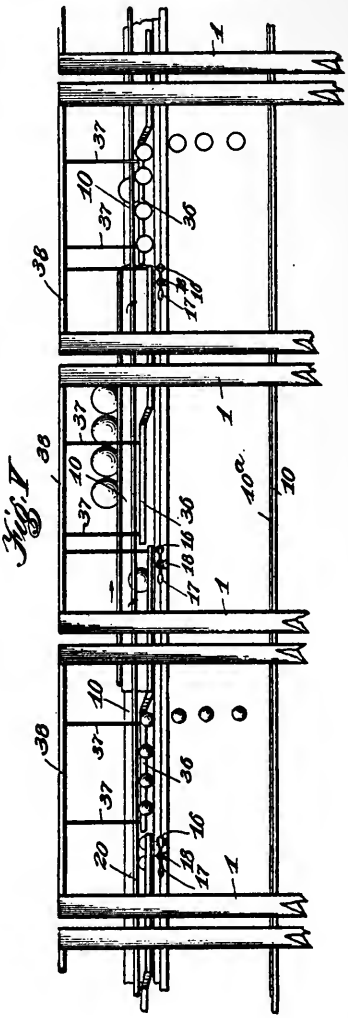


Fig. I

Witnesses
Emma A. Strain
H. P. Hackley

Inventor
Thomas Strain
by Townsend Bros
Atts

No. 775,015. PATENTED NOV. 15, 1904.

T. STRAIN.

FRUIT GRADER.

APPLICATION FILED JAN. 12, 1903.

NO MODEL. 3 SHEETS—SHEET 3

Fig. VII

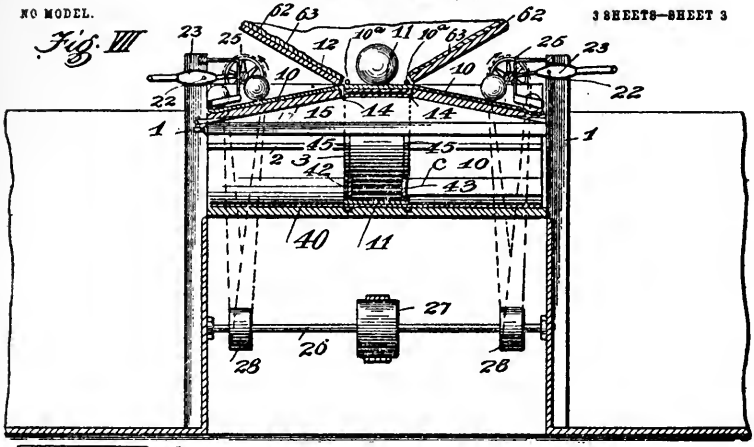


Fig. VIII

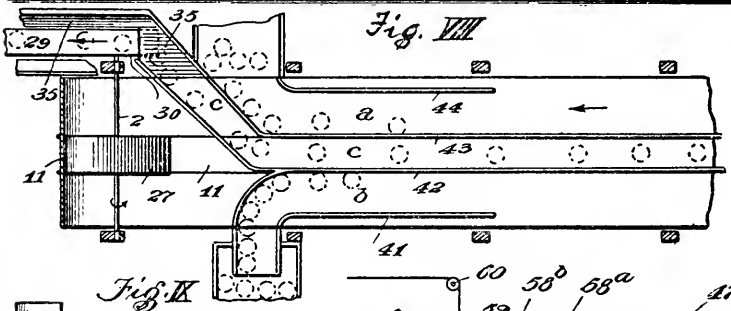


Fig. IX

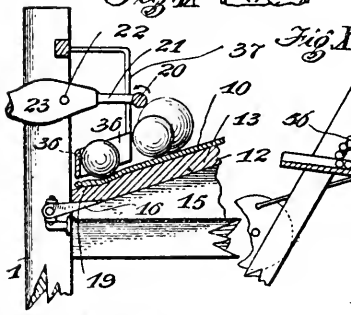


Fig. X

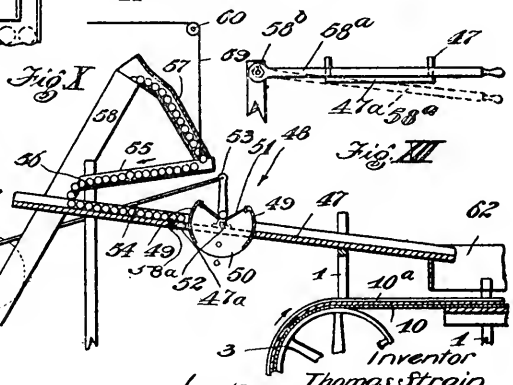


Fig. XII

Witnesses
Emma A. Strain
G. P. Hackley

Inventor
Thomas Strain
by Townsend Bros
his Attys

No 775,015. Patented November 15, 1904.

UNITED STATES PATENT OFFICE.

THOMAS STRAIN, OF PLACENTIA, CALIFORNIA.

FRUIT-GRADER.

SPECIFICATION forming part of Letters Patent No. 775,015, dated November 15, 1904.

Application filed January 12, 1903. Serial No. 138,752. (No model.)

To all whom it may concern:

Be it known that I, THOMAS STRAIN, a citizen of the United States, residing at Placentia, in the county of Orange and State of California, have invented a new and useful Fruit-Grader, of which the following is a specification.

My invention relates to a machine by means of which different sizes of fruit may be gaged and sorted or separated into bins.

One object of my invention is to provide a fruit-grader which will effectively grade the fruit without damaging the fruit.

Another object of my invention is to provide means whereby the fruit will be thoroughly mixed or delivered into each bin in such a way that the several sizes of fruit in each bin are perfectly distributed. This is a valuable feature, for the reason that although the average size of fruit in different bins will vary, still the actual size of fruit delivered into each bin will also vary somewhat.

Briefly, my invention consists of means for conveying the fruit along an inclined surface and means arranged along the inclined surface to hold fruit of certain sizes at certain points on the inclined surface and to allow certain sizes of fruit to escape at certain points along the inclined surface.

Referring to the drawings, Figure I is a diagrammatical plan view which shows the general arrangement of the fruit-grader. Fig. II is a side elevation of the conveyer, showing only a few bins. Fig. III is a plan view of what is shown in Fig. II. Fig. IV is a detail of a fragment of part of the feed-regulator. Fig. V is an enlarged side elevation of a section of the elevator, showing three bins. Fig. VI is a plan view of what is shown in Fig. V. In this view only one side of a portion of the elevator has been illustrated. Fig. VII is an enlarged section taken on the line VII VII, Fig. III. Fig. VIII is a plan view, partially in section, of the lower part of the feeding end of the grader. In this view the lower half of the belt is shown. Fig. IX is a transverse sectional view of a portion of one side of the upper part of the grader. Fig. X is a detail of part of the feeding device. Fig. XI is a perspective view of a guard and adjustable deflector. Fig. XII is a detail of a device for regulating the flow of fruit through the feeding-trough.

1 designates a supporting-frame. The length of the frame will be dependent upon the number of bins employed in the grader. It should be understood that only a few bins are shown in the drawings and that as many bins may be used as desired. Mounted at one end of the frame is a shaft 2, upon which is mounted a pulley 3. At the other end of the frame a pulley 4 is mounted on a shaft journaled in a frame 5, the frame 5 being slidably mounted on horizontal bars 6, supported by the frame 1.

7 is a flexible connection attached to the frame 5 and passes over an antifriction device 8, carried by the frame 1.

9 is a weight carried by the flexible connection 7.

10 is a conveyer-belt which has secured in any suitable manner along it inner middle face a narrow reinforcing strip or belt 11, which latter is mounted upon the pulleys 3 and 4. The conveyer-belt 10 is relatively very much wider than the strip 11.

12 is a table having a middle portion which is horizontal and having sides which are inclined or sloping along each side of the center horizontal part. The central flat part is provided with a slight longitudinal recess in which loosely rides the belt 11. The inclined part of the table 12 is made in sections consisting of a series of hinged leaves 13, each leaf being hinged to the center portion of the table, as at 14.

15 represents cross-bars carried by the frame 1. 16 designates wedges which are interposed between the outer edges of the leaves 13 and the cross-bars 15. Each wedge 16 is connected to a lever 17, the lever 17 being pivoted to a bracket 18. By manipulating the lever 17 and moving the wedges 16 in or out the leaves 13 may be raised or lowered and given a greater or less inclination, as desired.

The belt 10 is supported upon the upper surface of the table 12. Each leaf near its outer edge is provided with a concave depression 19.

20 designates grading-rods arranged along

opposite sides of the grader, each rod being rotatably mounted on adjustable arms 21. Each arm 21 is pivoted to the frame 1, as at 22. Each arm 21 is provided with an enlargement 23, one face or side of which is normally in close contact with the frame 1 to afford sufficient friction for holding the arm 21 in the position in which it is placed, the friction produced being sufficient to hold the arm in the desired position. The grader-rods 20 should be long enough to reach to the end of the conveyer. The grading-rods are comparatively slender, as shown, and are flexible to a considerable extent and are supported at intervals by the arms 21, so that any section of a grading-rod may be adjusted relatively to the conveyer. For instance, an intermediate section may be adjusted to the desired height above the conveyer without disturbing the adjustment of the other sections. When each section of the grading-rods has been adjusted, as desired, a grading-rod may not be straight, but the flexibility of the rods and comparatively slow speed at which they run permit of such adjustment. The general line of a grading-rod is of course inclined to the conveyer, but the arms 21 are provided so that when they are adjusted each section of a rod lying between adjacent arms may be substantially parallel with the conveyer. The grading-rods are provided with pulley 25 at one end.

26 is a driving-shaft mounted on the frame 1 and driven by a pulley 27.

28 represents pulleys mounted on the driving-shaft 26, each of which is connected with a pulley 25 by crossed belts.

The grading-rods 20 revolve in opposite directions, and the movement of the lower face of the rod is always away from the lower plane of the inclined leaves. This movement prevents fruit from being drawn in under the rods and squeezed against the conveyer-belt. The fruit does not pass under the rods until the space reached is just large enough for the fruit to pass through easily.

29 designates an auxiliary conveyer-belt which is mounted on pulleys 30 and 31. The pulley 31 is connected to another pulley, 32, by a shaft 33, which latter is mounted on a bracket 34. The pulley 32 is driven by a belt from the pulley on the shaft 26. Arranged at each side of the belt 29 are sloping side plates forming a trough 35.

36 designates guards which are supported by rods 37, which are suspended from bars 38. The guards 36 are suspended in such a way that they lie close to the conveyer-belt and yet do not touch the belt, and as the fruit passes under the grading-rods at different points it is shunted by the guards 36 into the proper bins. The guards 36 are arranged along each side of the conveyer-belt, one guard for each bin.

36ª represents brackets attached to the edges of the leaves. Mounted on each bracket is an inclined deflector 36ᵇ. The deflector 36ᵇ is provided with a lug 36ᶜ, and the latter is adjustably mounted on the bracket 36ª and clamped thereto by means of a set-screw 36ᵈ. The deflector 36ᵇ may be placed at any desired point along the bracket 36ª, so that fruit will be shunted into the bin at any desired point. This allows the fruit to be delivered into the bin in such a way that it is thoroughly mixed. If the fruit were delivered into the bin direct from under the grading-rods, the size of fruit in the bin at one extreme side would be larger than the size at the other side. To obviate this difficulty, I employ the guards 36 and deflector 36ᵇ, by means of which the fruit is thoroughly mixed in the bin, and no particular size occupies a particular place in the bin, as would be the case were the guards and deflectors not employed.

39 designates a pulley on the shaft 2.

40 designates a pulley on the shaft 26.

The pulleys 40 and 39 are connected by a belt.

41 42 43 44 designate walls which are supported by rods 45. The rods 45 are carried by cross-bars 15. The walls 41, 42, 43, and 44 are suspended above the bottom part or run of the belt 10 in such a way that they lie close to the belt and yet do not touch the belt. These walls provide three troughs *a b c*. Troughs *a* and *b* provide for guiding into suitable bins the fruit that is removed by the sorters from the conveyer-belt. The troughs *a* and *b* are merely of sufficient length to extend along that portion of the length of the grader which is devoted to the sorters. In a fruit-grader which is thirty feet long this space devoted to the sorter may be about one-third. The middle trough *c*, as shown in Figs. II and III, communicates, through the medium of a trough 46, with the upper surface of one side of the conveyer-belt 10. The other end of the trough *c* is offset and terminates in the trough 35.

47 designates an inclined trough arranged over the feeding end of the grader. In the center of the trough 47 is an oscillatory feed-regulator 48, formed of segmental plates 49, which plates are connected together by pieces 50, the feeder being pivotally mounted at 52 to the trough 47.

51 designates plates which are adjustably attached at angles to the segmental plates 49. The plates 51 are spaced apart at their adjacent edges, the space being sufficiently small to retain fruit which it is desired to have pass through the grader and yet will allow fruit which is very much undersized and which it is not desired to grade to drop through the space and be discharged.

The feed-regulator 48 is provided with an upright arm 53, which may be connected with

any rotatable part by means of a rod 54. Arranged above the trough 47 is a tilting table 55, pivoted at 56.

57 is a trough which extends from the upper end of the fruit-elevator 58 to the tilting table 55.

59 is a flexible connection from the free end of the tilting table 55, which passes over a pulley 60 and may be connected with a prime feeding device which is not shown in the drawings. When the tilting table 55 becomes filled with fruit, the weight of the fruit causes the table to tilt downward, which pulls on the flexible connection 59, and the latter controls the action of the prime feeding device. (Not shown in the drawings.) The fruit is discharged from the tilting table 55 into the trough 47 and rolls down the same till it comes in contact with the feed-regulator 48. It stays in that position until the feed-regulator is rocked into such position that the plate 52 is brought into a position that allows the fruit to roll up onto the plate 52 and into the V-shaped portion of the feed-regulator. The feed-regulator after being filled is gradually rocked into the position shown in Fig. X and continues until the fruit in the regulator is discharged therefrom into the lower part of the trough. The fruit in the trough 47 is prevented from entering the feed-regulator by reason of the curved segmental plate 49. Any fruit which has been admitted to the feed-regulator which is undersized will fall through the opening between the two plates 52.

58^a is a bar which is pivoted at 58^b to the trough 47 and lies transversely of the trough, the trough 47 being slotted, as at 47^a, to receive the bar 58^a. By swinging the bar 58^a into or out of the trough the fruit may be stopped or allowed to travel. When the fruit is stopped thereby, the fruit piles up and accumulates on the tilting table, causing the same to operate and shut down the prime feeding device. (Not shown.)

In operation fruit is delivered onto the conveyer-belt 10 from the trough 47. The fruit is carried along on the conveyer-belt 10 between the ridges 10^a, extending longitudinally on the outer face thereof. Sorters who stand along both sides of the grader near the feeding end pick out what fruit is not suitable for packing and place such fruit in the troughs *a* and *b*, and this fruit is conveyed by the lower part of the belt through the troughs *a* and *b* and delivered into suitable bins. The sorters pick off good fruit from between the ridges 10^a and place it on each of the inclined sides of the belt, where the fruit rolls down against the grading-rods 20 and is carried along the grading-rods 20. The space between the grading-rods and the belt 10 gradually varies, so that the larger fruit is carried by the conveyer-belt to the farther end of the grader and the small fruit is allowed to escape under the grading-rods at a point much closer to the feeding end of the machine. Intermediate sizes of fruit will escape under the rods at intermediate places along the rod. It will be observed that by reason of the rotation of the rods 20 the fruit is prevented from becoming pinched between the rods 20 and belt 10, the rotation of the rods being in a direction which does not tend to draw the fruit under the rods. It will be seen that the fruit is carried to the utmost limit as determined by the space which will allow or retain the fruit on the conveyer-belt 10. When a certain size fruit is discharged under the rod 20, which can only occur at clear spaces between consecutive guards 36, it rolls down the inclined belt and rest against the lower section of a guard 36. (See Fig. IX.) When the fruit is in contact with the guard 36, it rests in the concave hollow depression 19.

The guard 36 serves to hold the fruit from being delivered into the bin until the belt has traveled a sufficient distance to bring the fruit to the desired point opposite the bin, at which point the deflector 36^b, which stands in front of the offset inclined part of the next guard, shunts the fruit into the bin. The hollow depression holds the fruit on the conveyer-belt after the fruit has passed under the grading-rods before being shunted by the guards. Fruit that is not removed by the sorters from the central portion of the belt is carried to the farther end of the grader, where it is deflected by means of the grader 61 and delivered into the trough 46, down through which the fruit rolls, being discharged onto the lower part of the belt 10, falling into the trough *c*. The fruit is conveyed back to the feeding end of the grader by the lower part of the belt and is guided by the trough *c* into the trough 35, and from the latter it is delivered onto the auxiliary conveyer-belt 29, which carries it rearward to the elevator 58, the connection between this conveyer and elevator is not shown in the drawings.

The space between the rods 20 and the conveyer-belt may be adjusted in two ways—either by raising or lowering the grading-rods 20 by means of the arms 21, or by raising or lowering the leaves 13 by moving the wedges 16 in or out by manipulation of the levers 17. The latter method is preferable for the reason that it does not throw the grading-rod 20 out of its natural alinement. It should be understood that as the grading-rod 20 is slender it permits of being adjusted within reasonable limits—that is, it permits being thrown out of straight alinement. By raising and lowering the leaves 13 accurate adjustment of space may be secured for each section of the grader. It should be understood that the movement of the leaves or of the rods 20 when being adjusted is very slight, comparatively, and that the guards 36 are arranged a sufficient distance above the conveyer-belt to

allow the desired movement in adjusting the leaves.

Referring to Fig. VII, 62 designates a trough formed of inclined plates provided on their upper surfaces with padding, such as 63, these serve to guide and soften the fall of the fruit from the trough 47 onto the conveyer-belt 10, the oranges in falling strike the padded portion 63, which prevents the fruit being bruised.

It should be understood that I contemplate making such changes and alterations in the herein-described embodiment as will come within the scope of my invention.

What I claim, and desire to secure by Letters Patent of the United States, is—

1. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, and means for adjusting intermediate sections of the grading-rod relatively to the grading-rod.

2. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, a series of arms supporting said grading-rod at intervals, means for supporting said arms, and means for frictionally holding said arms in a desired position.

3. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, a table for supporting said inclined conveying means, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and means for supporting said grading-rod embracing an arm pivoted between said pair of bars and a bolt passing through said bars and arm.

4. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, a table for supporting said conveying means, a plurality of pairs of upright bars supporting the table, an arm pivoted between each pair of bars, an inclined grading-rod lying along said line of travel above said conveying means, said rod being rotatably mounted in said arms and means for rotating said rod.

5. A fruit-grader comprising traveling means for conveying fruit along a definite line of travel, said means embracing movable opposite inclined portions and flexible means for retaining fruit on each of said inclined portions and lying along said line of travel above said conveying means and having its axis inclined.

6. A fruit-grader comprising traveling means for conveying fruit along a definite line of travel, means embracing movable opposite inclined portions the inclination of each portion being transverse of the line of travel, a plurality of flexible inclined grading-rods, each rod lying along said line of travel above said conveying means, and means for rotating said grading-rods.

7. A fruit-grader comprising traveling means for conveying fruit along a definite line of travel, means embracing movable opposite inclined portions, the inclination of each portion being transverse of the line of travel, a plurality of flexible inclined grading-rods, each grading-rod lying along said line of travel above said conveying means and means for rotating said grading-rods in opposite directions.

8. A fruit-grader comprising traveling means for conveying fruit along a definite line of travel, means embracing movable opposite inclined portions, the inclination of each portion being transverse of the line of travel, a plurality of flexible grading-rods, each grading-rod lying along said line of travel above said conveying means, and means for rotating said grading-rods in opposite directions, the directions of rotation of each rod being such that the moving under surface of each rod is substantially directed away from the lower plane of its adjacent inclined portion of said conveying means.

9. A fruit-grader comprising means for conveying fruit along a definite line of travel embracing an endless belt, means for supporting opposite sides of said belt in symmetrical inclined positions, means for gaging fruit on said inclined portions of said belt and lying along said line of travel above said belt, said latter means having their axes inclined in the same direction.

10. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means embracing an endless belt, means for supporting opposite sides of said belt in symmetrical inclined positions, a plurality of grading-rods, each rod lying along said line of travel above said belt, both grading-rods being inclined in the same direction, and means for rotating said grading-rods.

11. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means embracing an endless belt, means for supporting opposite sides of said belt in symmetrical inclined positions, a plurality of grading-rods, each grading-rod lying along said line of travel above said belt, both grading-rods being inclined in the same direction, and means for rotating said grading-rods, the direction of movement of both rods being such that the moving under surface of each rod is substantially directed away from the lower plane of the inclined parts of said belt.

12. A fruit-grader comprising a frame, a table consisting of a horizontal central portion having a plurality of opposite hinged leaves,

means for supporting said leaves in a desired position, an endless belt, means for propelling said belt longitudinally over said table, and means for retaining fruit on said belt and lying along said line of travel above said belt and having its axis inclined.

13. A fruit-grader comprising a frame, a table consisting of a horizontal central portion having a plurality of opposite hinged leaves, means for supporting said leaves in a desired position, an endless belt, means for propelling said belt longitudinally over said table, means for retaining fruit on said belt and lying along said line of travel above said belt and having its axis inclined, and means for adjusting each of said leaves independently of the others.

14. A fruit-grader comprising a frame, a table consisting of a horizontal central portion having a plurality of opposite hinged leaves, means for supporting said leaves in a desired position, an endless belt, means for causing said belt to travel longitudinally over said table, means for gaging fruit on said belt, and lying along said line of travel above said belt and having its axis inclined, cross-bars on said frame under each leaf, a wedge interposed between each leaf and each cross-bar and means for adjusting said wedges.

15. A fruit-grader comprising a frame, a table consisting of a horizontal central portion having a plurality of opposite hinged leaves, means for supporting said leaves in a desired position, an endless belt, means for causing said belt to travel longitudinally over said table, and means for retaining fruit on said belt, and lying along said line of travel above said belt and having its axis inclined, a plurality of cross-bars on said frame, a cross-bar being under each leaf, a wedge interposed between each leaf and cross-bar, and a plurality of levers pivoted to the frame, each lever being connected to a wedge.

16. A fruit-grader comprising a frame, a table supported on the frame consisting of a horizontal central portion having a plurality of pivoted leaves, a pulley rotatably mounted at one end of said table, a frame slidably mounted on horizontal bars at the other end of said first-mentioned frame, a pulley rotatably mounted on said slidable frame, a belt carried by said pulleys, the upper half of said belt lying along and supported upon said table and leaves, and means for drawing said pulley in a direction away from said first-named pulley and thereby placing said belt under tension.

17. A fruit-grader comprising a frame, a table supported on the frame consisting of a horizontal central portion having a plurality of leaves, a pulley rotatably mounted at one end of said table, a frame slidably mounted on horizontal bars at the other end of said first-mentioned frame, a pulley rotatably mounted on said slidable frame, a belt carried by said pulleys, the upper half of said belt lying along and resting upon said table and leaves, a flexible connection connected to said slidable frame, a sheave supporting said flexible connection, a weight carried by the end of said flexible connection.

18. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards and deflectors mounted above said conveying means.

19. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards mounted above said conveying means, each guard comprising offset walls, each wall lying in different vertical planes, the inner wall lying adjacent said grading-rod.

20. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, guards for said conveying means, brackets connected to the frame and supporting said guards.

21. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards mounted above said conveying means and a deflector adjustably mounted near said guard and movable along said guard.

22. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards mounted above said conveying means, a deflector, a perforated lug thereon, a horizontal bracket mounted on said frame and parallel with said guard, said perforated lug being mounted on said bracket and a set-screw through the lug and bearing against the bracket, said deflector-plate lying at an angle to said guard.

23. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, stationary guards mounted above said con-

veying means, a deflector with a perforated lug thereon, a horizontal bracket mounted on said frame and parallel with one of said guards, said perforated lug being mounted on said bracket and a set-screw through the lug and bearing against the bracket said deflector lying at an angle to said guard, and parallel with the offset part of said guard.

24. A fruit-grader having a frame, a table consisting of a depressed horizontal central portion, a plurality of leaves hinged on opposite sides, an endless belt movable along the upper surface of said table and leaves, and a relatively narrow reinforcing-belt on the inside of said main belt, said reinforcing-belt lying within said depressed central portion.

25. A fruit-grader having a frame, a table having a depressed horizontal central portion, a plurality of leaves hinged on opposite sides of the central portion, an endless belt movable along the upper surface of said table and leaves, a relatively narrow reinforcing-belt on the inside of said main belt, said reinforcing-belt lying within said depressed central portion, and a pair of opposite ridges on the outside face of said conveyer-belt.

26. A fruit-grader having a frame, a table mounted on the frame embracing a plurality of opposite hinged leaves, each leaf being provided with a concave depression along its outer edge, a conveyer-belt mounted to move along the upper surface of said table and leaves, a pair of grading-rods arranged along opposite sides of the leaves and inside of said depression, and means for rotating said grading-rods.

27. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, a plurality of flexible inclined grading-rods lying along said line of travel above said conveying means, means for rotating said grading-rods, means for feeding fruit to one end of said conveying means, and a deflector at the other end of said conveying means.

28. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rods, means for feeding fruit to one end of said conveying means, a deflector at the other end of said conveying means, a trough having a mouth arranged adjacent said deflector, said trough extending below the upper part of the belt, and having its discharge-spout arranged above the central part of the lower part of the conveyer means.

29. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for feeding fruit to one end of said conveying means, means at the other end of said conveying means for transferring fruit from the retaining portion of said conveying means, a longitudinal trough mounted above the retaining or lower part of said conveying means.

30. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for feeding fruit to one end of said conveying means, means at the other end of said conveying means for transferring fruit to the returning portion of said conveying means, a longitudinal trough mounted above the returning or lower part of said conveying means, an auxiliary conveyer connecting with the rear end of said last-named trough, said auxiliary comprising an endless belt mounted on a pair of pulleys, and means for driving said pulleys.

31. A fruit-grader comprising a frame, a pulley mounted in each end of said frame, a belt mounted on said pulleys, a conveyer-belt connected to said first-named belt, means for supporting the outer portions of said conveyer-belt in inclined positions, a pair of grading-rods mounted above said conveyer-belt, each rod being near the outside edge of the conveyer-belt and slightly above the belt, the space between the rods and the belt at the feeding end of said belt being less than the distance between said rods and said belt at points beyond said feeding end, and means for rotating said rods in opposite directions.

32. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for feeding fruit to said conveying means comprising an inclined trough, an oscillatory feed-regulator mounted transversely of said trough, said feed-regulator comprising a pair of segmental curved plates concentric with the axis of said feed-regulator, a pair of flat plates mounted on the upper edges of said curved plates, the free edges of said flat plates being at angles to each other, and means for oscillating said feed-regulator.

33. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for feeding fruit to said conveying means comprising an inclined trough, an oscillatory feed-regulator mounted transversely

of said trough, said feed-regulator comprising a pair of segmental curved plates concentric with the axis of said feed-regulator, a pair of flat plates mounted on the upper edges of said curved plates the free edges of said flat plates being at angles to each other, and means for oscillating said feed-regulator, the axis of said feed-regulator being substantially in a line with the bottom of said inclined trough.

34. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, means for grading fruit lying along said line of travel above said conveying means and having its axis inclined, means for feeding fruit to said conveying means embracing an inclined trough, an oscillatory feed-regulator extending transversely of said inclined trough, means for oscillating said feed-regulator, and a balanced tilting table mounted above said inclined trough.

35. A fruit-grader comprising a frame, a table supported by the frame embracing a horizontal portion, inclined hinged leaves, a pulley mounted on each end of the frame, a belt carried by the belt, said belt movable along over the upper faces of said table and leaves, means for feeding fruit to the upper face of said belt at one end, means at the other end of said belt for transferring fruit from the upper face of the belt to the lower part of the belt, a trough extending along the upper side of the lower part of said belt, said trough being slightly above the belt and at its rear end being offset and extending beyond the edge of the belt, and a pair of relatively short auxiliary troughs parallel with the main part of the longitudinal trough and adjacent the offset of the main trough.

36. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, a series of bins arranged along each side of the conveying means and means for adjusting portions of said grading-rod to various heights above the conveying means adjacent to each bin.

37. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for supporting said conveying means embracing a table consisting of a central horizontal portion and a plurality of inclined hinged leaves arranged along each side of the horizontal part, a plurality of bins for the respective leaves, a bin being arranged adjacent each leaf, means for adjusting each leaf independently of the others, a plurality of guards for the respective bins, each of said guards extending considerably each side of the partition between two bins.

38. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, means for feeding fruit to said conveying means comprising an inclined trough, an oscillatory feed-regulator rotatably mounted in said inclined trough, said feed-regulator comprising a pair of segmental curved plates concentric to the axis of said feed-regulator, a pair of flat plates, each plate being provided with elongated slots, screws passing through said slots and fastening said flat plates to said curved plates, and means for rocking said feed-regulator.

39. In a device of the character described, means for feeding fruit thereto consisting of an inclined trough, an oscillatory feed-regulator arranged transversely of said trough, said feed-regulator comprising a pair of curved segmental plates concentric with the axis of said feed-regulator, and a pair of flat plates adjustably secured at angles to said curved plates, and means for rocking said feed-regulator.

40. In a fruit-grader, a frame, a driving-shaft mounted at one end of the frame, a slidable regulating-frame mounted on horizontal bars of the main frame, a shaft mounted on said slidable frame, a pulley mounted on the latter shaft, a pulley mounted on the driving-shaft, a conveyer-belt mounted on the two pulleys, a second shaft mounted on the frame, a pair of grading-rods extending longitudinally of said conveyer-belt, each rod being spaced slightly above the belt and inclined, a pair of pulleys on the second driving-shaft, a pulley on the rear end of each grading-rod, a belt connecting each of said pulleys with pulleys on the second driving-shaft, an auxiliary conveyer comprising a pair of pulleys, a belt connecting said pulleys, said auxiliary conveyer lying parallel to said conveyer-belt, bins arranged along each side of the conveyer-belt, guards in front of each bin, said guards embracing a plate offset to form two parallel planes, a horizontal bracket mounted on the outer edge of a leaf, an adjustable deflector comprising a plate provided with a perforated lug, said lug being slidably mounted on said bracket and a set-screw passing through said lug and fastening the same to said bracket.

41. In a fruit-grader, a frame, a driving-shaft mounted at one end of the frame, a slidable regulating-frame mounted on horizontal bars of the main frame, a shaft mounted on said slidable frame, a pulley mounted on the driving-shaft, a traveling belt mounted on the two pulleys, a second driving-shaft mounted on the frame, a pair of grading-rods extending longitudinally of said belt, each rod lying

near and spaced slightly above the belt, each rod being inclined, a pair of pulleys on the second driving-shaft, a pulley on the rear end of each grading-rod, a belt connecting each of said pulleys with pulleys on the second driving-shaft, an auxiliary conveyer comprising a pair of pulleys and a belt connecting said pulleys, said auxiliary conveyer lying parallel to said conveyer-belt, bins arranged along each side of the conveyer-belt, guards in front of each bin, a guard embracing a plate offset to form two parallel planes, a plurality of brackets, a bracket being mounted on the edge of each leaf, an inclined deflector-plate having a perforated lug, said lug being mounted on a bracket, the plane of said plate being parallel to the offset angular portion of the guard near which said deflector-plate is attached.

In testimony whereof I have signed my name to this specification, in the presence of two subscribing witnesses, at Los Angeles, in the county of Los Angeles and State of California, this 7th day of January, 1903.

THOMAS STRAIN.

Witnesses:

GEORGE T. HACKLEY,

JULIA TOWNSEND.

[Defendant's Exhibit No. 7.]

[Endorsed]: U. S. District Court, No. 1562. Defendant's Exhibit No. 7. Filed Aug. 7, 1914. ————, Referee.

Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy.

F. STEBLER.

DISTRIBUTING APPARATUS.

APPLICATION FILED MAY 12, 1908.

943,799. **Patented Dec. 21, 1909.**

2 SHEETS—SHEET 1.

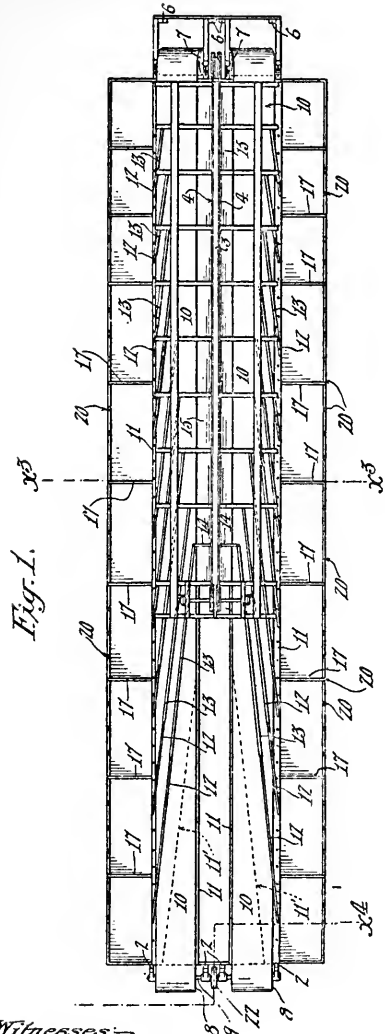


Fig. 1.

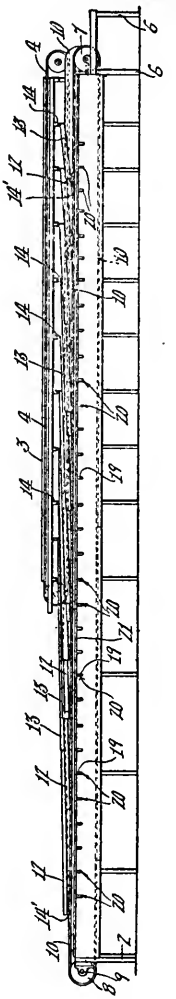


Fig. 2.

Witnesses:—
Frank Lahrahaun
Louis W Gaty

Inventor;
Fred Stebler.
by Townsend Lyon & Hardy
his Attys

F. STEBLER.

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2 SHEETS—SHEET 2.

Fig. 3.

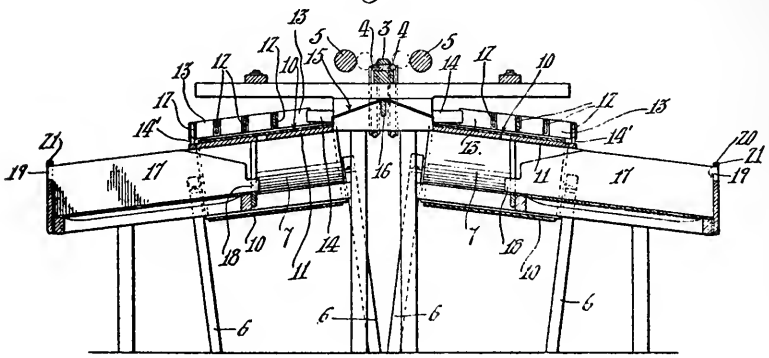


Fig. 4.

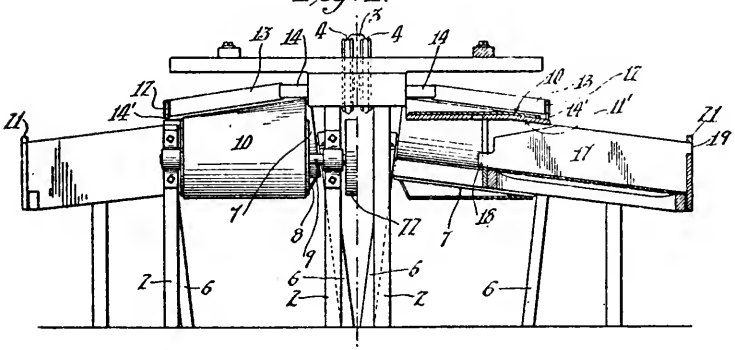


Fig. 5.

Witnesses:-
Frank L. Graham
Louis W. Gratz.

Inventor:
Fred Stebler.
by Townsend Lyon & Hassler
His Attys.

UNITED STATES PATENT OFFICE.

FRED STEBLER, OF RIVERSIDE, CALIFORNIA.

DISTRIBUTING APPARATUS.

943,799. Specification of Letters Patent. Patented Dec. 21, 1909.

Application filed May 12, 1908. Serial No. 432,548.

To all whom it may concern:

Be it known that I, FRED STEBLER, a citizen of the United States, residing at Riverside, in the county of Riverside and State of Califernia, have invented a certain new and useful Distributing Apparatus, of which the following is a specification.

This invention relates to means for carrying or distributing fruit, and is more particularly designed for use in connection with a fruit sizer or grader, and has for its general object the provision of simple and efficient means whereby the several grades or sizes of fruits, such, for example, as oranges, may be conducted to wide bins suitably spaced along the floor of a packing house so as to provide sufficient room at the sides of the bins for the fruit packers to work.

Another object of the invention is to provide a suitable distributing apparatus in connection with a short or small grader or sizer, thus enabling the use of a short sizer or grader and still deliver the separated or sized fruit in bins of such width as to provide easy access thereto for the packers.

In packing fruit, such, for instance, as oranges, it is very desirable to have the sized or graded fruit delivered in wide bins, so that two or more packers may work at the side of each bin, as it has been found that where fruit is being separated or graded it is liable to run mainly to two or three different sizes. It is much desired, therefore, to use wide bins which will enable two, or even more, packers to work at the side of a given bin in wrapping the fruit in papers and packing the same in the boxes.

Heretofore it has been necessary either to provide a very large or long fruit grader or sizer, so as to conduct the several grades of fruit some distance along the grader before being discharged into the bins, or to utilize smaller bins. With this invention it is possible to use a relatively short grader or sizer and utilize a distributing conveyer, and to carry the separated and sized fruit to bins of the desired width extended much beyond the length of the grader and arranged at the sides of the conveyer.

With these and such other objects in view as shall appear from the hereinafter contained description of the apparatus and its operation, the invention consists in the provision, in connection with a fruit sizer or grader such, for example, as the "California grader" of Letters Patent of the United States to James Ish No. 458,422, dated August 25, 1891, or any other suitable grader, of a horizontally traveling conveyer so arranged that the conveyer is tilted sidewise so as to extend slightly downward from the side of the grading or sizing machine, and in the provision, in connection with such conveyer, of guiding means arranged along the conveyer and in suitable relation to the several grading discharges of the separating means as to form ways through which the separated fruit is carried by said conveyer and thereby delivered to suitable bins arranged below and along such conveyer.

The invention consists further in the provision of means whereby such guiding means may be adjusted to deliver the given grade or size of fruit, either to any particular portion of the bin or to any one of several successive bins, so that in case the fruit being sized or graded runs very heavily of a given size or grade, such fruit may be delivered into a series of bins, thus enabling a large number of packers to have ready access to that size or grade of fruit and handle the fruit and pack the same as rapidly as graded or sized.

A further object of the invention is to provide in connection with such fruit grader or sizer, and such conveyer and guiding means, removable and adjustable partitions in the bins so that the width thereof may be varied to suit the requirements.

By thus providing bins whose longitudinal extension may be adjusted with respect to the longitudinal extension of the conveyer of the distributing apparatus, it is possible to provide the necessary bin room for all of the different sizes or grades of the fruit regardless of the run of the fruit. In packing oranges it is often found that the run of the fruit is particularly heavy to one or two given grades or sizes and it is essential in practical use to be able to provide sufficient bin room for the sizes or grades of which there are the greatest number of oranges in a given run. This has been found to be one of the great difficulties which have heretofore existed with all apparatus where machinery has been used in sizing or grading oranges, and it is one of the important objects of this invention to provide means which will accomplish this result without interfering with the grading or

sizing and at the same time permit the compact installation of the machinery and the ready access to the bin room by the packers.

Further objects and ends to be attained will be apparent from the construction and operation of my distributing apparatus as hereinafter described and shown in the drawings, wherein I have shown one embodiment of the invention, it being apparent that many modifications may be made without departing from the spirit or scope of the invention.

The invention will be more readily understood by reference to the accompanying drawings forming a part of this specification, and in which—

Figure 1 is a plan view of a distributing apparatus embodying my invention, the same being shown in connection with a double or two sided fruit grader or sizer, the fruit grader or sizer indicated in the drawings being the well known "California grader", the main features and principles of which are set forth in the Ish patent No. 458,422 before referred to, but, as indicated, instead of a flat belt, a round rope belt traveling in a groove is shown as the same has ordinarily been used in such California grader; and the apparatus being duplicated to discharge fruit on both sides of such double grader. Fig. 2 is a side elevation of such apparatus. Fig. 3 is a cross sectional view on the line x^3—x^3 Fig. 1. Fig. 4 is a cross sectional view on the line x^4— Fig. 1. Fig. 5 is an enlarged, detail view of one of the guiding means, showing the telescopic construction thereof and manner of pivoting the same upon the supports thereof on the frame of the machine.

In the preferred form of the invention and in the embodiment shown in the drawings, the fruit grader or grading is mounted upon suitable standards 2 in the ordinary or any preferred manner, and such fruit grader is made up of a longitudinal divider 3 provided with a groove in which the grading belt or rope 4 travels. 5 (Fig. 3) indicates the grading roller. The construction of this longitudinal divider, grading rope and grading roller is commonly known in the art and is illustrated in patent to Robert Strain No. 730,412 of June 9, 1903, and I have, therefore, considered it not essential to more fully illustrate the same in the drawings herein. Said grading element is adjusted to deliver or discharge fruit of different grades at different longitudinal portions thereof.

As indicated, the grading rope 4 is carried by suitable sheaves suitably mounted and driven. As shown in the drawings, two grading ropes and two grading rollers 5 are shown in the drawings, thus forming a double or two sided machine. As each side, however, is simply a duplicate of the other, I will describe only one of the two fruit distributing apparatus, the other being a duplicate. The fruit distributing means comprises supporting and guiding means, namely, the conveyer 10, and guide means 12, 13, arranged alongside of the grading element and adjusted to receive the fruit therefrom and to deliver the same at longitudinally distributed points, for example to a series of bins. The machine is of especial advantage in delivering to a series of bins where longitudinal extension is greater than that of the grading element, thereby giving more room for the packers, and for that purpose the distributing means is constructed so that its delivery portion is of greater longitudinal extension than the grading element. At one end of the frame of the machine I provide suitable standards 6 which, as shown, are mounted at an incline or angle so that the sheave 7 carried thereby is mounted so as to be inclined downwardly away from the grading element. The other end of the machine is provided with a sheave 8 whose axis or shaft 9 is arranged horizontally in suitable bearings in the standards 2 of the frame.

As indicated best in Fig. 1 of the drawings, the longitudinal traveling conveyer or belt 10 is carried along under the grading element at such inclination, *i. e.*, inclined downwardly away from the gradeway formed by the traveling belt and grading roller, but arranged under the same so that the fruit discharged from such gradeway falls onto the inclined traveling conveyer. The upper run of the belt or traveling conveyer 10 is supported throughout the length of the machine by a bed 11 which extends at an angle inclined downwardly from the grading element toward the bins the width of the belt, and at a point beyond the length of the grading element I provide a hip 11′ in this bed 11 underneath the traveling conveyer and adapted to bring the conveyer down into a horizontal position so that the belt or conveyer is delivered upon the sheave or pulley 8 in a horizontal position crosswise of the belt, thus providing for the belt traveling upon the sheaves 7 and 8 and preventing the same running off therefrom. At distances along the frame of the apparatus, corresponding to the several grades or sizes of fruit arranged to be discharged from the grading element, I provide a series of guiding means preferably made up in two sections 12, 13, the section 13 being pivotally mounted upon suitable bars or studs 14 of the frame of the machine. The section 13 is preferably of such form as to receive within it the section 12 so that the section 12 may be drawn out or pushed back within the section 13 so as to bring the end of the guiding means at any point along the bin to which it is desired to deliver the

given grade of fruit. The front end of the section 12 of such guiding means is provided with a socket in which a suitable pin 14' may be placed, such pin being also inserted in one of the holes 15 along the edge of the bed 11. It is thus seen that by extending or contracting the telescopic guiding means, the point of delivery of the fruit from the belt may be adjusted as desired. In general, when the series of bins is longer than the grading element, the guides 12, 13 will diverge outwardly and will all be directed obliquely forward and outward. Underneath the grading element I arrange a canvas 15 upon which the fruit from the grading element is adapted to drop or be delivered and by which such fruit is directed onto the traveling conveyer 10. Where a double grader is used, this canvas preferably extends from a point at the inner edges of the traveling conveyers 10 over a suitable support 16 arranged below the longitudinal divider 3. Underneath the apparatus and extending out beyond the sides thereof, I arrange a suitable frame adapted to receive the usual canvas false bottom. This frame is provided with a series of removable partitions 17 preferably so arranged that the position of the partitions may be varied as desired to provide fruit receiving bins positioned with respect to the grading element as desired and thus made of adjustable width so that bins for a particular grade may be provided of the size corresponding to the run of the fruit. As shown in the drawings, these adjustable partitions 17 are provided with portions 18 adapted to be inserted in slots formed in the back wall of the bin frame, there being a suitable number of such back slots to provide suitable amount of adjustment. The front ends of the partitions 17 are provided with a portion 19 adapted to be inserted in slots 20 on the front wall of the bin frame. Preferably the removable partitions are held in place by a strip 21 lying upon the front wall of the bin frame and secured in any suitable manner. The conveyers 10 are driven by driving one of the pulleys or sheaves 7, 8 in the ordinary or any preferred manner such, for instance, as a pulley or sheave 22 from which a belt may pass to any suitable source of power. By thus providing means whereby the longitudinal extension of the bins, with respect to the conveyer, may be adjusted to suit the run of the fruit, the bin room and the distribution of the sized fruit is wholly within the control of the operator of the apparatus, and it is possible to so deliver the fruit that immediate and ready access can be had thereto by packers in sufficient number to readily and quickly handle and pack the sized fruit.

In operation the fruit being discharged from the grading element onto the canvas 15 rolls onto the traveling conveyer between two of the adjustable guiding means which form a trough for the travel of the fruit. As the conveyer is inclined downwardly from the grading element and toward the bins, the longitudinal movement of the belt, assisted by gravity, carries the fruit through such trough and discharges the same at the end of the guiding element. It is readily seen that by this arrangement the fruit may be delivered to any portion of the bin as desired, and wide bins may be used so that a large number of packers may work at any one bin.

It is much preferable to slightly incline the conveyer 10 downward toward the bins. If the conveyer 10 is arranged horizontal and not inclined, the fruit must be forced into contact with the guiding means 12, 13, and this forcible and continuous contact will cause abrasion of the tender skins of fruit, such as oranges, and cause the rapid decay thereof. By inclining the conveyer the downward pitch is utilized to cause the oranges to roll toward the outer or discharge edge of the conveyer preventing the continued forcible contact with the guiding means which would occur were the conveyer flat or horizontal in cross section. When the conveyer is arranged flat the oranges are carried to the guiding means at the rear or most advanced side of the chute thereby formed and the continued movement of the conveyer holds the oranges in forcible contact against such guiding means as the oranges are carried across the width of the belt along the guiding means.

Having described my invention, I claim:—

1. The combination with a fruit grading element constructed to deliver fruit at different longitudinal portions, of traveling supporting and distributing means extending laterally from the grading element and inclined downwardly away therefrom, the longitudinal extension of the delivery portion of the said distributing means being greater than the longitudinal extension of the grading element.

2. In combination with a grading element constructed to deliver fruit at different longitudinal portions, a distributing apparatus therefor comprising a conveyer traveling longitudinally of the grading element, and guiding means arranged along the conveyer forming chutes to guide the fruit and bins arranged along the length of said conveyer and at the sides thereof.

3. The comomation with a grading element adapted to deliver graded fruit at different longitudinal portions of the element, a traveling conveyer extending longitudinally under said grading element and extending beyond the end thereof a series of bins whose longitudinal extension is greater than the longitudinal extension of the grad-

ing element arranged along the side of said conveyer, and guiding means for guiding the fruit along said conveyer and from the grading element to the series of bins.

4. The combination with a grading element and a series of bins, of a conveyer traveling longitudinally under the grading element and along the side of the series of bins, and guiding means arranged along the conveyer to guide the fruit to the bins, said guiding means diverging toward the bins.

5. In combination with a fruit grader comprising a suitably mounted member and a traveling belt arranged adjacent to said member so as to form the way or chute, for the fruit, a series of bins whose longitudinal extension is greater than the longitudinal extension of the grader, a traveling conveyer arranged under said fruit grader and extending at the side of said series of bins, guiding means for guiding the fruit along said conveyer to said bins, and means for adjusting the longitudinal position of the outer ends of said guiding means, and thereby determine the portion of said bins to which the graded fruit is delivered.

6. A distributing apparatus comprising, in combination with a grading element, a horizontally traveling conveyer inclined downward away from said grading element, bins arranged below and along said conveyer, and guiding means arranged along the conveyer providing chutes for directing fruit to the bins.

7. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt forming the way or chute for the fruit to travel along and thereby be graded by gravity, a traveling conveyer arranged thereunder and of greater length than said grader, a series of bins arranged at the side of said conveyer and means in conjunction with said conveyer for directing the fruit along said conveyer to the respective bins.

8. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming therewith the grading way or chute for the fruit to pass along and be graded by gravity, a traveling conveyer arranged thereunder, a series of bins arranged along the side of said conveyer, an adjustable guiding means arranged along the conveyer and forming a chute for directing the graded fruit from the point of discharge from said conveyer into said bins, said guiding means being adjustable to shift the point of discharge longitudinally of the conveyer.

9. In combination with a grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming in conjunction therewith the way, or chute, for the fruit to pass along and be separated or assorted by gravity, a distributing apparatus for a fruit grader or sizer comprising a horizontally traveling conveyer, a pulley for said conveyer mounted on an inclined axis and a second pulley mounted on a horizontal axis, the conveyer being extended between and passing over said pulleys, a bed supporting the upper run of said conveyer and provided with a hip over which conveyer travels as it approaches said horizontal pulley, and guiding means arranged along the conveyer forming chutes for the fruit.

10. The combination with a fruit grading element and a series of bins, of a distributing apparatus therefor, comprising a horizontally traveling conveyer, a pulley for said conveyer mounted on an inclined axis and a second pulley mounted on a horizontal axis, the conveyer being extended between and passing over said pulleys, a bed supporting the upper run of said conveyer and provided with a hip over which conveyer travels as it approaches said horizontal pulley, and guiding means arranged along the conveyer forming chutes for the fruit.

11. The combination of a fruit grading element and a series of bins, the walls of said bins being adjustable longitudinally of the series, and a distributing apparatus comprising a conveyer traveling longitudinally between the fruit grading element and the bins, and guide means arranged along the conveyer and forming chutes for guiding the fruit from said conveyer to said bins, said guide means being adjustable to shift the longitudinal position of their outer ends in accordance with the longitudinal positions of the walls of the bins.

12. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming in conjunction therewith the way, or chute, for the fruit to pass along and be separated or assorted by gravity, a distributing apparatus comprising fruit supporting means outwardly and downwardly inclined from one side to the other, and guide means extending obliquely across the supporting means, each guide means comprising telescoping members.

13. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming in conjunction therewith the way, or chute, for the fruit to pass along and be separated or assorted by gravity, a distributing apparatus comprising fruit supporting means outwardly and downwardly inclined from one side to the other, guide means extending obliquely across the supporting means, each guide means comprising telescoping members, and means for adjusting the longitudinal position of the outer ends of said members.

14. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming a grading way or chute for the fruit to pass along and be separated or assorted by gravity, a series of bins, a distributing apparatus therefor comprising a conveyer traveling longitudinally of the grading element and guiding means arranged along the conveyer forming chutes to guide the fruit to said bins.

15. In combination with a fruit grader comprising a graduated rotary member and a traveling endless belt arranged adjacent thereto and forming a grading way or chute for the fruit to pass along and be separated or assorted by gravity, of traveling separating and distributing means extending under said fruit grader and inclined downward away therefrom, the longitudinal extension of the delivery portion of said distributing means being greater than the longitudinal extension of said grader, and a series of bins arranged along said distributing means.

16. In combination, a grading element and a distributing apparatus therefor, and bins arranged at the side of the distributing apparatus, said distributing apparatus comprising a conveyer traveling horizontally and longitudinally of the grading element and under the same, guiding means extending transversely of the conveyer and forming separated chutes for the fruit and opening into respective bins.

17. A grading element and fruit bins, in combination with a conveyer of greater length than the grading element and extending alongside said fruit bins, and guiding means, on the surface of said conveyer and forming separated chutes for the separated and sized fruit, extending transversely of the conveyer.

18. In combination, a grading element and a distributing apparatus therefor, bins arranged at the side of the distributing apparatus, said bins provided with movable partitions whereby the widths of the bins along the distributing apparatus may be adjusted, said distributing apparatus comprising a conveyer traveling horizontally and longitudinally of the grading element and under the same, and guiding means extending transversely of the conveyer and forming separated chutes for the fruit and opening into respective bins.

19. A grading element, in combination with a distributing apparatus comprising a horizontally traveling conveyer inclined downward away from said grading element, guiding means arranged along the conveyer providing separated chutes for directing the fruit, and bins arranged below and along side said conveyer, said bins provided with movable partitions whereby the width of the bins may be adjusted with respect to the longitudinal extension of said conveyer.

20. The combination with a grading element and a series of bins, of a conveyer traveling longitudinally under the grading element and along the side of the series of bins, and adjustable guiding means arranged along the conveyer to guide the fruit to the bins, said guiding means diverging toward the bins, said bins provided with movable partitions whereby the longitudinal extension of the respective bins may be adjusted with relation to the length of the conveyer.

In testimony whereof, I have hereunto set my hand at Riverside, California, this sixth day of May 1908.

FRED STEBLER.

In presence of—
DORA V. GAMBEE,
FREDERICK J. LYON.

[Defendant's Exhibit No. 8—Letter, March 11, 1914, California Iron Works to Villa Park Orchards Assn.]

Bryan Clamp Trucks. Fred Stebler, Proprietor.
Phone Pacific 1408.

(Plate) California Iron Works,
Manufacturing Machinists,
Iron and Brass Founders,

Supplies for Steam Plants, Pumping Plants and Irrigating Systems, Manufacturers of Fruit Packers' Machinery.

Office, 117 Ninth Street, Riverside, California.

March 11, 1914.

Villa Park Orchards Assn.,
Orange, Calif.

Gentlemen:

Since I have not heard from you further with reference to supplying your equipment and knowing that you are also considering a proposition from a competitor I suppose I may assume that for some reason he may have offered you a proposition which you have decided to accept. I shall be very glad to hear from you in any case and if this be true I shall be glad to have ~~have no further use for it.~~ you return the drawing I made for you as I suppose you will have no further use for it.

In this connection however I suppose you are aware of the fact that the machines Mr. Parker is offering you are in controversy as regards the patent on them. This applies not only to the Grader but the Automatic Endless Elevating Dumper as well. This

is a machine with which it is proposed to take your fruit out of the basement and automatically elevate and dump it into the Washer. The *j*ist of my con*tor*versy with Mr. Parker lies in the fact as I have repeatedly proved it, that he has built up his business by preying on and appropriating inventions which I own and which have proved valuable in the interest of the Orange Packer. Of course you understand he does not do this openly but on the pretense that because his machines are as he alleges [247] better or different he has a right to them. In every instance so far where the issue has been tried out to a conclusion I have been sustained and he has been proven to be in the wrong.

However this may be you may say how can this interest you as Mr. Parker will undoubtedly if asked to, agree to indemnify you. Forgetting for the moment and for the purpose of argument, the moral issue involved in this, it remains yet to be shown that Mr. Parker can in the end fully indemnify you for a possible interference or loss sustained in the event of an infringement suit against you.

There is in this instance a more immediate and important issue involved which you can well afford to consider seriously, that is whether or not the machines Mr. Parker is offering you, and particularly the grading machines are up to the full standard of efficiency requirements. Possibly you may have interviewed casually some users of this machine which as you know is practically new and has not had the benefit of a seas*ons* use to fully determine whether or not it will handle fruit of all kinds and shapes satis-

factorily and up to modern requirements. Possibly some may have told you that it does how-

Villa Parks Orchards Assn. #2.

ever this may be I wish to call your attention to two material and important advantages which my grading machines have and which [248] Mr. Parkers machines admittedly cannot have. One is that the rollers on the Grader are absolutely independently adjustable with relation to each other which insures and absolute independent control of the sizes within the will of the Packer. The other is the wide latitude of adjustment of the partition boards of the bins to permit of handling certain individual sizes with two or more packers as the fruit comes to the Grader. Particularly is this advantageous when picking to size or when the sizes may be running excessively large or excessively small.

Of more importance than either of these, however, is the accuracy or uniformity of sizes which the Grader will deliver to any individual bin, for, as you know, the trade will not now, as it formerly would, stand for mixed sizes. Of course, if the fruit were anywhere nearly round there would not be so much

difficulty about this, but when it gets enlongated or oblong in shape is when the difficulty begins and fruit grading machines that employ the incline travelling belt in place of the rope to propell the fruit through the machine are particularly weak on this point as the tendency of the elongated fruit with rope and roller machines is much greater to size by the shortest diameter only which any machine is expected to do than in the machine having a flat incline belt substituted for the rope. Consider this, then, in connection with the fact that in Parker*s* machine you have a grade opening at each roller of but 12 or 15 inches in length as against a grade opening of anywhere from 24 inches to 36 inches in length at each roller in my machine and you can begin to see the matter is of some importance.

Consider this then also with the fact that the Riverside Heights Orange Growers' Assn. after three years' experience along these lines who are the original supporters of Mr. Parker*s* efforts and who are now using four of Parker*s* Graders of the latest model are realizing and admitting that these machines are failures so far as modern requirements are concerned and you [249] will begin to see that the matter is even of more importance still. I am writing this in a spirit of logical reasoning and if you will receive it and consider it in like manner I am satisfied you will be cautious and fair in your conclusions and I am willing to go further along the same lines to convince you and prove to you the truth of every statement herein made and will close by asking that you accept it in the manner it is offered namely

in the furtherance of your own interests.

Yours truly,
FRED STEBLER.

[Endorsed]: Defts. Ex. 8. U. S. District Court. No. 1562. Defendant's Exhibit No. 8. Filed Aug. 7, 1914. ————, Master, ~~Referee.~~ Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas, N. Williams, Deputy Clerk. [250]

[Report of Special Master on Accounting.]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

To the Honorable OLIN WELLBORN, United States District Judge, in Equity Sitting:

I, Lynn Helm, by an Interlocutory Decree entered in the above-entitled matter on the 7th day of November, 1913, pursuant to the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, appointed Special Master to take and state an account of the gains, profits and advantages which the said defendants and each of them have or has derived, received or made by reason of their infringement of the plaintiff's reissued letters patent No.

12,297, and to assess such damages against said defendants, and each of them as plaintiff has sustained or shall sustain by reason of said infringement or either of them, and to report thereon with all convenient speed, do respectfully report, that I have been attended by the said plaintiff, by Frederick S. Lyon, Esq., his attorney, and by said defendants, and each of them, by Nicholas A. Acker, Esq., their attorney, and having heard the evidence produced before me on behalf of the respective parties to said proceeding, the reporter's transcript of which, together with an account or statement [251] in writing, under oath, by each of the defendants, the Riverside Heights Orange Growers' Association and George D. Parker, respectively, of the number of infringing machines made, sold or used by them, or either of them, in infringement of reissued letters patent No. 12,297, dated December 27, 1904, together with the details of such manufacture and sale of each of such sales, and the gains, profits or advantages made or received by either of them in, by or through the manufacture or sale or use of each of said machines and also the exhibits referred to in said reporter's transcript, are returned herewith; and having examined and carefully considered the same, together with the record of the proceeding heretofore had in this case now on file in said court, which was all the evidence submitted upon said hearing before me by either of the parties to said proceeding; and having heard the arguments of counsel, and being fully advised in the premises, do respectfully report as follows:

1. It is not disputed that it is the duty of the special master to determine by the accounting all the infringing acts of the defendants.

The account should embrace not only the profits derived by the defendants and damages sustained by the plaintiff by reason of the infringing machines made before the institution of the suit, but also those made afterwards, though the construction be different. The accounting is had up to the time of the report. Stebler v. Riverside Heights Orange Growers' Association, (Opinion by Hon. Olin Wellborn, U. S. District Judge, filed February 18, 1914), Knox v. Great Western Quicksilver M. Co., 6 Sawyer, 430; Fed. Cases No. 7947; Hoe v. Scott, 87 Fed. 220; Starrett Co. v. Brown & Sharpe Mfg. Co., 208 Fed. 887, 893; Brown Bag. Filling Co. v. Drohn, 171 Fed. 438; Hopkins on Patents, Sec. 413, p. 584; Walker on Patents, (4th Ed.), Sec. 742.

That the defendants were guilty of infringing the plaintiff's [252] patent prior to November 7, 1913, was fully determined by the Interlocutory Decree entered herein on that date. Since that decree, by a modified construction of the infringing device, I find the defendant Parker has further infringed the plaintiff's patent.

The modified Parker machines have all the elements and perform all the functions of the plaintiff's patent, as defined by the Circuit Court of Appeals. The several rollers of the modified machines perform the same function in substantially the same manner as in the Strain invention and in the previous Parker device.

Understanding, as we do, the type of machine described by the Circuit Court of Appeals in this case, we may describe the modified Parker machines as we observed them at the Riverside Heights Orange Growers' Association packing house as, a combination with a traveling belt (a canvas belt of about 8 or 10 inches in width, slightly raised in the center to force the oranges against the side walls of the machine, being used in these instances) upon which the oranges are dumped and carried forward on the belt, with a series of independent rotating units about 45 inches in length placed end to end and arranged in longitudinal succession parallel with the traveling belt, each transversely adjustable, that is, each capable of being raised or lowered by means of a bracket between each set of rollers with an adjusting screw, the rotation of which serves to vary the distance of the bearing of the rollers from the other members of the grading opening. In this way, the distance of the rollers from the traveling belt is graduated in successive rollers so as to form a gradual increase in width of the grade opening between the walls and the belt from the feed end toward the other end of the machine. The rolls constituting the rotating wall of the grader are connected one to the other for the purpose [253] of rotation, and they are driven in unison from power positively applied at one end. In order to control the two adjacent rolls within the limits of practical operation it was necessary to make one of these machines with conical or tapering rolls, the larger end of each roll arranged next to the smaller end of the succeeding

adjacent roll, and in connection with the other machine whether the rolls were in uniform diameter throughout to place under them sticks or guides of about two-thirds the length of the rolls at the farthest end from the feed end for the purpose of limiting the outlet of the fruit. In either case, all the fruit of a particular size went through the upper 12 or 15 inches of each roll. Thus in the conical-shaped rolls the fruit went through the space underneath the smaller end of the roll for about one-third of the length of the roll and until the increasing diameter of the roll prevented other fruit from passing under the roll and the fruit of larger size was forced on to the next roll. In the case of the roll of uniform diameter the stick prevented the fruit from passing under the roll after it passed the opening at the upper end of the roll.

The difference between this modified Parker device and the Parker patent is that in the Parker patent the rolls which formed the upper member of the runway were independent of each other and were separated by a board or extensible guide arms, which filled the idle space between the rolls when they were set at a distance from each other, and effectively controlled the sizing operation of the machine. In the new machine, the larger portion of the tapered roll in one machine or the portion of the roller in the other machine that extended over the stick or guide corresponded to the idle space constituted by the overlapping sticks or boards or extensible guide arms, in the Parker patent. There was thus provided in all machines a method for [254] limiting the outlet

opening between the roller and the traveling belt to a definite portion of the unit, thereby presenting the same function in delivering the fruit of a different size at a definite portion of the runway. The mode of operation is substantially the same. There is nothing that serves substantially to differentiate the two devices.

The only real difference between the two devices is that in the Parker patent the rolls are rotated by the fruit, and in the modified devices the rollers are positively driven. The difference of their being end to end rollers is only one of degree, in the latter devices they being closer end to end than in the former. The modified device is a series of end to end rollers all so connected that they are positively driven from the roller at the head end of the machine, while in the Strain reissue patent each roller is driven by a separate belt from the common shaft. The function in regard to the rotation of the rollers is the same in each case since they all rotate together in either case. Practically, inasmuch as these rollers are all so connected that they rotate together they constitute a single roller. The essence of each of these inventions is the combination with a traveling belt of a series of independent rotating units arranged in longitudinal succession, parallel with the belt, each traversely adjustable.

There is this about the modified Parker Grader, that the series of connected rollers driven in unison and constituting the outer wall member of the fruit runway of the Grader, are not independently adjustable with respect to each other, nor

are they independently rotatable with respect to each other whereas, in the plaintiff's invention the rollers on the graders are absolutely independently adjustable. It may be true that in the modified Parker machines the adjustment of the initial or forward end of the roller does affect the rear end of the [255] preceding roller, but this is immaterial, as the rear end of the roller does not in operation of the machine form any part of the grade opening. The adjustment of the grade opening in all these machines, the Strain, the Parker Patent and the Modified Parker, is the adjustment of one grade opening independent of the effect upon the adjacent grade opening.

In so far as the rollers are end to end and connected so as to rotate together, they are similar in construction in the Modified Parker Machine to the grader exhibited at the Rialto Packing-house. The Rialto Packing-house machine was made after the Strain invention. Of this machine, it was stipulated that the rollers constituting the rotating wall of the gradeway are connected one to each other for rotation, and they are all driven in unison by power applied at one end and by means of a sprocket, and that the rollers of the grader constituting the rotating wall member of the runway are mounted in bearings, which bearings are adjustable toward and from the fixed members of the runway to vary the position of the rotating rollers relative thereto, the adjustable bearings separating two ends of adjacent rollers, the bearing covering two adjacent ends. The manner of separating and adjusting the roller side of the run-

way of said grader is not such as to permit in any manner of individual adjustment of separate grade openings formed by the roller surface and the belt, and in this respect the machine corresponds to the California Grader referred to in the record in this case. This machine is licensed under the Ish patent, under date of March 11, 1905, and the Rialto Orange & Lemon Association paid for such license to the plaintiff herein the sum of fifty dollars as a license fee. This machine at the Rialto Orange & Lemon Association's packing-house is not in all respects a California Grader as existing prior to the Strain invention, and as described in the opinion of the Circuit Court [256] of Appeals; but it is a modification of the California Grader or Ish Grader and evidently made with knowledge of the previous Strain invention. With the state of the art prior to the Strain patent the Master has nothing to determine; it has already been determined by the Circuit Court of Appeals.

In practical operation all of these machines have opposite each roller a bin, and as the fruit comes down the traveling belt it is graded by the smallest size passing under the roller with the smallest opening, the largest fruit passing on to the roller where the opening is of the size that will admit of the fruit passing under into the bin. The operation and function of each device is the same, and the same results are obtained from the modified Parker devices as from the devices manufactured under the Strain patent or the Parker patent. While the Parker devices may be an improvement upon the devices man-

ufactured under the Strain patent, yet it must be found that they are practically equivalents, and are constructed on the same principle and perform the same functions. I, therefore, find that the modified Parker device is not materially different from the device manufactured under and described in the Parker patent, and that having been held an infringement of the Strain patent, the modified device must also be held to be an infringement.

The plaintiff is, therefore, entitled to recover on account of the manufacture and sale of these modified Parker machines, the profits which the defendant Parker derived from the manufacture and sale thereof and also such damages as the plaintiff may have sustained and proved as having been suffered by him because of the infringement by the defendant Parker of the plaintiff's patent in these respects. [257]

2. ACCOUNT OF THE PROFITS, GAINS AND ADVANTAGES WHICH THE DEFENDANTS AND EACH OF THEM HAVE DERIVED, RECEIVED OR MADE BY REASON OF THEIR INFRINGEMENT OF THE PLAINTIFF'S PATENT:

Congress has awarded a remedy to the owner of useful inventions, in that it has provided for the recovery from the infringer of the profits made by him, and also the damages sustained by the patentee, and it has further provided that, in cases where the Court finds that the facts warrant it, the actual damages may be increased to the extent of three fold.

Rev. Stats., Secs. 4919, 4921; Walker on Patents (4th Ed.), Sec. 568.

In stating an account of gains, profits and advantages which the defendants and each of them have or has derived, received or made by their infringement of said plaintiff's patent, and in assessing damages which the plaintiff has heretofore sustained by reason of its said infringement upon a bill in equity by the owner against the infringers of a patent, I have understood the rule to be that the plaintiff is entitled to recover the amount of the gains and profits that the defendants have made from the manufacture, sale and use of the machines.

The burden of proof concerning the receipts of profits by the defendant Parker from the sale of the patented machines, and also concerning their precise amount devolves upon the plaintiff with this exception, that if the defendant claims that the machines containing the infringement also embody other matter, patented or unpatented, which is a factor in the profits realized by its use or sale, and claims that the burden of proof is upon the plaintiff to segregate the part of the profits arising from the infringement of the patented machine from the general profit accruing from the machines, it is *en*cumbent upon the defendant to prove that the peculiar features, or some substantial part of such peculiarities or former patents or other matter foreign [258] to the infringement claimed were embodied in the patented article sold, and that they were of such a character that they probably contributed to the profits.

In Canda Bros. v. Michigan Malleable Iron Co.,

152 Fed. 178, 181, Circuit Judge Severens stating the opinion of the Court said:

"The principle upon which this exception is grounded is well settled; but, before it can be applied, it is encumbent on the defendant to prove that the peculiar characteristic features or some substantial part of such peculiarities of the former patents were embodied in the patented articles sold, and that they were of such a character that they probably contributed to the profits. Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000. On this being shown, the burden of proof is devolved on the party seeking to recover the profits to prove what part of the entire profits are due to the use of his own invention. He must make the separation of values and show to the court how much is his rightful proportion. Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371."

In the practice of ascertaining the profits which an infringer has derived from the manufacture and sale of a patented article, the following rules have been enunciated by the Supreme Court of the United States in Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 614.

(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits.

(b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. Hurlbut v. Schillinger, 130 U. S. 456, 472.

(c) Where profits are made by the use of an art-

icle patented as an entirety, the infringer is liable for all the [259] profits "unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him." Elizabeth v. Pavement Co., 98 U. S. 126.

(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, "give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." Garretson v. Clark, 111 U. S. 120."

An attempt has been made in many cases to force an accounting in reference to infringement of patents into one or the other of the rules above mentioned, but it must be apparent that while there are many rules applicable to patent law, both as to determining the validity or invalidity of patents, or as

to the accounting which may follow, that many cases must be found within exceptions to the rule rather than in the strict letter of any rule that may be laid down. The real controversy arises when applying principles of law in those cases where it is impossible to say that a particular case comes directly within a given rule, [260] for there are cases, and this is one, where the patent and the ascertaining of its profits come within more than one of the rules above laid down.

It has been claimed on behalf of the defendant in this case, and counsel for the defendant strenuously relies thereon, that the rule (d, *supra*) laid down in Garretson v. Clark applies to this case because of the fact that the claims of the patent here infringed, 1 and 10, are confined as follows:

Claim 1: "In a fruit-grader, in combination a plurality of independent transversely adjustable rotating rollers; a nonmovable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers; said rollers and guide forming a fruit-runway; a rope in the groove in said guide and means to move said rope."

Claim 10: "In a fruit-grading machine, a runway formed of two parrallel members, one of said members consisting of a series of end-to-end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth."

Claims 1 and 10 of the patent, it is urged, do not include a bin and distributing system; and therefore

the burden must be upon the plaintiff to show in what particulars his improvement has added to the usefulness of the machines or contrivances, and he must separate the profits derived from the sale of the infringing machines into those parts which are derived from the grading system and those derived from the bins and distributing system.

There were connected with the orange sizers certain other unpatented features such as the bin and distributing system, which while they are capable of segregation for the purpose of **[261]** ascertaining the respective costs of manufacture, were all sold together with the sizer as a complete machine, and it is impossible to determine the selling price of either otherwise than as they were sold as a whole.

The testimony in this case shows that there were 72 machines of the whole or large size made by the defendant Parker under the Parker patent which infringed the plaintiff's patent. The cost to the defendant Parker of manufacturing the sizers covered by the plaintiff's patent was $149.25 each. The defendant Parker manufactured also 13 half sizers, or single machines, at a cost of $94.04 each. The bins and distributing system cost $182.59 for the double sizers and $112.06 for the single or half sizers. The double sizers sold for $425.00, making a profit thereon of *$92.16*, and the single or half sizers sold for $225, making a profit of *$78.90* thereon. It will thus be seen that while the cost of manufacture is distributed into its component parts, the sale price is in each case of a completed article. It is true,

that the plaintiff also in making these machines separated the cost of the sizers from the cost of the bins and distributing system, and fixed a price for the sale of the sizers, independent of the bins and distributing system, at $175, and that he sometimes sold the sizers without selling the bins to persons who desired to put the sizers upon a grader system which they already had, using the bins already in their possession.

But the defendant Parker, in no case, has sold sizers independent of the bins, or of the entire grading system, and in no instance was said defendant able to segregate the profits of the sizers from the profit of the entire machines.

I have come to the conclusion that it was not necessary in this case for the plaintiff to separate or apportion the defendant's profits between the patented features of the sizer **[262]** and the unpatented features of the completed grader, but that the profits in this case are to be calculated on the whole machine for the following reasons:

The patent, though using the old elements of an orange sizer, in fact being as described by the Circuit Court of Appeals, as a modification or addition to the Ish machine, gives the entire value to the combination, and the plaintiff is entitled to recover all of the profits derived from the sale of the machine by the defendant Parker.

This is a combination patent, and the claims herein infringed are included in the combination. There are several parts which go to make up the

combination of the complete sizer or grading machine. The parts of a sizer consist of the traveling belt, or canvas, the adjustable rolls, the machinery which drives the belts and rolls and the bins in which the fruit is finally received. Without the bins the sizer would no more be complete than without the traveling belt. In fact, it has been found in this case that the object of a sizer with predetermined grade spaces fixed by adjustable rollers, was in its relation to the bin space for the assorted fruit. The problem in handling several sizes of oranges was to provide adequate bin space, or give access thereto for the requisite number of packers employed in sorting as to quality, wrapping and packing the oranges. As the result of the patent, the operator, at will, could adjust the grade size of the machines as he saw fit, and subject to certain limitations, might deliver any size of orange into any bin. The fact that the inventor directed his attention to the traveling belt and adjustability of the rolls, does not make the bins any less a part of the machine. The bins and distributing system are old and simple, and it is enough to say that there is no patent upon them separately. **[263]**

It will be noticed that in the case of Garretson v. Clark, *supra*, it was founded on patents for improvements "in the method of moving and securing in place the movable jaw or clamp of a mop head" as Mr. Justice Field puts it. To be more precise it was for the provision of a nut to be connected with the collar of the movable clamp and adapted to be moved up or down on the thread shank of the handle,

and as the learned Justice said: "With the exception of this mode of clamping, mop heads, like the plaintiff's had been in use time out of mind." I do not take it, that there would have been any question, if this had been a new invention of a mop head, between the profits derived from the mop head and the mop stick, but that it would have then been held, though old elements were used, the entire value of the combination was given to the device by the mop head, and that the plaintiff would have been entitled to recover all the profits. There is little doubt that in the case of a machine embodying several patented improvements and infringements of several patents belonging to several different persons, there should be a separation of the profits derived from the several patents. This, however, was a case of a patent for an improvement, and not of an entirely new machine or contrivance, and the application of the rule in Garretson v. Clark must be confined to the latter; this is evident when the Court therein speaks of the apportionment "between the patented features and the unpatented features."

In the case of Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 125, the Circuit Court of Appeals, in speaking of this language says:

"Now when we remember that there are two classes of patents, one for simple elements, and another for combinations of elements, and the distinguishing characteristics of the two **[264]** classes, it is readily seen how impossible it is to apply this language to the other class of patents than those of the class specified. In a combination patent

there are no unpatented features in the sense that they are separable from patented ones, and no one of the elements is patented. They may all be old and not patentable at all unless there is some new combination of them. The point to be emphasized is that the law looks not at the elements or factors of an invented combination as a subject for a patent, but only to the combination itself as a unit distinct from its parts, and in such case there could be no comparison of patented and unpatented parts."

It is not a fact that the whole of Strain's invention resides in the traveling belt and adjustable rolls, but it extends to all other parts of the grader. This *bring* this case within the authority of Brennan & Co. v. Dowagiac Mfg. Co., 162 Fed. 472. In that case, the Court said:

"The claims of the patent in suit are not restricted to single things, but some of them—the first, for instance—include the several elements which go to make up the seeding part of a drill, in combination. It covers them all as one whole. Every one is made material by including it in the combination. The spring devices are not thereby patented. For the purposes of the claim and the patent thereon, they are on the same footing with all the other parts of the drill, however old and common they may be. Anyone might make and sell each and every part, or any lesser or larger combination of such parts, including the spring device, without infringing the patent, provided, of course, they are not intended to contribute to the making up of the entire combination covered by the patent. But one part in a com-

bination is no more patented than another. All in association are patented. **[265]**

The parts of a drill consist of a carrier, a seed box or reservoir, and the seeding apparatus. It is to the latter that the attention of inventors has been principally directed. The carrier and the seed box are old and simple. Of them it is enough to say that no one appears in this case to have any patent on them.

* * * * * * * *

The case here is not a patent for an improvement upon another article, which does not cover that other article, but only the improvement made upon it. The patentee cannot in such case extend his invention over the thing improved, if the latter is patented. If not, he may appropriate it, as others of the public may. The distinction is well illustrated by the improvement of the harvester in Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024. When, therefore, the defendant sold one of the plaintiff's machines, he sold that which in all its associated parts was covered by the patent; and a Dowagiac drill, without the Hoyt patented combinations, would be but the fragment of a drill and have no distinctive character. The invention was not an addition to an otherwise complete machine.

In the cases of Elizabeth v. Paving Company, 97 U. S. 126, 24 L. Ed. 1000, and Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011, no doubt the material employed, the blocks, the sand, the gravel, the cement, could have been put down in the usual way in some other fashion, and have been of

some value as a pavement, but not to the extent of excellence that one laid according to the patent would have been. Indeed, the records in both those cases show that former patents had taught how this might be done. But the patents then before the Court did not adopt some earlier method of paving and then add an improvement, but they pointed out a new way of organizing the materials, which was to be substituted for the old way; and **[266]** the Court held in each case that the owner of the patent was entitled to recover the profits made by building the pavement in the new way. In the latter of those cases Mr. Justice Blatchford, who formulated the rule laid down in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, delivered the opinion, and cited that case. He evidently regarded the language employed in the second alternative of the rule there stated as the statement of a broad principle, which would be applicable to cases not covered by the first.

We therefore think that the plaintiff was entitled to recover the profits made on the infringing machines."

I fully appreciate the application of the rule laid down in Garretson v. Clark, *supra*, and have fully considered the very recent case of Seeger Refrigerator Co. v. American Car & Foundry Co., 212 Fed. 742, but I do not consider that rule applicable to this case for the reason that it is not a patent for a portion of a sizer machine only, but embraces the entire machine, and all of its essential elements, and the patent gives its entire value to the combination.

In the case of Seeger Refrigerator Co. v. American Car & Foundry Co., *supra*, the entire value of the refrigerator car body, as a salable and marketable article, in conjunction with the running gear was not in law or in fact attributable to the invention of the patent in suit. During the accounting period, the defendant, in addition to the infringing cars made and sold many freight refrigerating cars otherwise equipped than with the Bohn partition covered by the patent. The Bohn partition did not "inhere in" and include an entire refrigerator car body as an entity or convert the car body into an entire structure constituting a new article of manufacture, but was only an improvement in a single element of an otherwise well known device. In reference to this the learned District **[267]** Judge who passed upon the master's report said:

"Under these circumstances this case called for an apportionment if practicable of profits as between the complainant and defendant in accordance with the principles of law and equity applicable to the subject. Where mechanism, consisting of a mechanical combination, is old and open to be made, used and sold by the public, and one of its elements is so improved as to confer patentability upon the combination, as a whole, but such improvement, while increasing the efficiency or value of the mechanism over what was before known or used, does not change its function or affect the principle of its operation, the owner of the patent in seeking only to recover profits from an infringer of the combination is limited to the excess of profits realized by

him from the manufacture, use or sale of the mechanism, as so improved, over what he might or would have made from the manufacture, use or sale of the old mechanical combination. Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; Maier v. Brown (C. C.), 17 Fed. 736; Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Brinton v. Paxton, 134 Fed. 78, 67 C. C. A. 204; Star Salt Caster Co. v. Crossman, 4 Barn. & Ard. 566; Baker v. Crane Co., 138 Fed. 60, 70 C. C. A. 486."

This is a sufficient quotation from the opinion in that case to distinguish it from the case at bar. That court, however, did recognize this principle, that "where the whole commercial or marketable value of an infringing mechanism arising from a patented improvement, the owner of the patent is entitled to recover from the infringer the total profits made from the manufacture and sale of such mechanism."

In Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, the Court said: **[268]**

"It appearing that the defendant's valve derived its entire value from the use of the Richardson invention covered by the patent of 1866, and that the entire value of the defendant's valve, as a marketable article, was properly and legally attributable to that invention of Richardson, the plaintiff is entitled to recover the entire profit of the manufacture and sale of the valves. Elizabeth v. Pavement Company, 97 U. S. 126, 139; Root v. Railway Company,

105 U. S. 189, 203; Garretson v. Clark, 111 U. S. 120; Callaghan v. Myers, 128 U. S. 617, 665, 666; Hurlbut v. Schillinger, 130 U. S. 456, 471, 472."

See Gould Mfg. Co. v. Cowing, 105 U. S. 253.

But there is no necessity of forcing this case into one or other of the classifications made in the case of Westinghouse Co. v. Wagner Mfg. Co., *supra*. There is still a further ground why the plaintiff should recover the profits made by the defendant infringer, and that is, the utter impossibility of making mathematical or approximate apportionment of the profits derived in this case, or segregating the profits derived from the sizers alone from the profits derived from the sale of the entire machine, including bins and distributing system. From the very necessity of the case one party or the other must secure the entire fund. In justice and in equity, the fund must be awarded to the patentee and not the infringer. The infringer is the wrongdoer, and the innocent patentee is entitled to recover, "the profits to be accounted for by the defendant." Of this, the Supreme Court of the United States, in Westinghouse v. Wagner Co., *supra*, pp. 620–622, said:

"This conclusion is said to be in conflict with the Garretson and other decisions which, it is claimed, justify the conclusion that the defendant is entitled to retain all of the profits even where the patentee is unable to make an apportionment. Warren v. Keep, 155 U. S. 265. An analysis of the facts **[269]** of those cases will show that they do not

sustain so extreme a doctrine. For they deal with instances where the plaintiff apparently relied on the theory that the burden was on the defendant, and for that, or other reasons, made no attempt whatever to separate the profits. None of the cases cited discuss the rights of the patentee who has exhausted all available means of apportionment, who has resorted to the books and employees of the defendant, and by them, or expert testimony proved, that it was impossible to make a separation of the profits. This distinction, between difficulty and impossibility, is involved in the ruling by the Circuit Court of Appeals for the Sixth Circuit in Brennan & Co. v. Dowagiac Mfg. Co., 162 Fed. Rep. 472, 476, where the Garretson case was distinguished, and the Court said:

" 'In the present case the infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of plaintiff's invention. . . . In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest with the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the Court to say to the innocent party, "You have failed to make the necessary proof to enable us to decide how much of these profits are your own"; for the party knows, and the Court must see, that such a requirement is impossible to be complied with. The proper remedy to be applied in such cases is that stated by Chancellor Kent in Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62,

108, where he said: "The rule of law and equity is strict and severe on such occasion. . . . All the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it." ' **[270]**

"It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion."

Applying these principles to the case at bar, it appears from the evidence in this case that the defendant Parker has received the profits upon the 72 whole or large-size machines of the Parker patent type, and upon 13 of the small type, or half size, made by the defendant Parker prior to the entry of the interlocutory decree herein, the sum of $5,245.06, as shown by the statement of account herein furnished by the defendant Parker, and not disputed by plaintiff (Record, pp. 22, 23), except that to this certain additions should be made because of errors in certain items furnished by the defendant Parker of the cost of the machines, as for instance, an error of $8.54 in the cost of mill work in 72 double and 13 single machines, making a total of $725.90; also an error in

the cost of belting of $4.66 per machine of the large type and $3.78 on the single or haif-size machines, making a total of $384.68.

There should also be added the profits of 4 machines sold for use in Porto Rico. There were two machines of the whole size selling for respectively $354 and $425, and 2 of the small type, selling for $210 each. The cost of manufacturing and selling these machines in Porto Rico, I find, was, the large size $223.14, and the small size $128.10, making the total cost of the four machines, $702.48. The machines sold for $1,199. [271] making a profit to the defendant Parker of $496.52, based upon the cost as to selling price arrived at according to the rules hereinbefore laid down.

I have made no allowance herein for the additional machine sold to Benchley, mentioned on page 4 of the reporter's transcript of the record herein, for the reason that while said machine sold for $195, there is nothing to determine the manufacturing cost thereof. It was a small quarter-sized grader and there is no record in the case of the cost of any such sizer made by the defendant or the plaintiff. It is therefore disregarded in the assessment of plaintiff's damages, as well as in the computation of defendant's profits.

We have, therefore, a total profit on the Parker patent type of the 72 machines of the large size and 13 of the small size and the 4 machines sold for shipment to Porto Rico of $6,852.16.

On the modified type of graders manufactured by the defendant since the entry of the interlocutory

decree herein, the profits shown by the defendant Parker in a statement of costs and sales thereof (Complainant's Exhibit 4), not accepted to by the plaintiff, were $2,450.52. This should be increased by $50.22, an error of $2.79 in the cost of each machine as to the item, "90′ 14″, 4-ply cotton belting, at $30.33," which only cost $27.54. The profit, therefore, derived from these machines was $2,500.74.

This will make a total of profits derived by the defendant Parker, but without making any allowance for overhead expenses in the cost of manufacturing said machines from the sale of the infringing machines, of $9,352.90. This will more concisely appear by a tabulated statement, Schedule A, as follows: [272]

Schedule "A" [to Report of Special Master on Accounting].

Profits on 72 whole Sizers and 13 half Sizers, "Parker Patent" type, conceded, Record, pages 22–23.....		$5,245.06
Correction—Error of $8.54 cost of mill work in 72 double and 13 single machines....		725.90
Correction—Error in cost of belting, $4.66 per machine, 72 machines	335.54	
In single machines, $3.78, 13 machines	49.14	384.68

4 machines sold for use in Porto Rico, sale prices....	$354.00	
	425.00	
	210.00	
	210.00	
	$1,199.00	
Less cost of 2 larger ones at $223.14 each, and 2 smaller ones at $128.10....	702.49	496.52
Total profit on "Parker Patent" type machines....		$6,852.16
On "Modified" type and sale of Rolls therefor:		
Amount as per supplemental statement $2,450.52		
Excess charge for cost due to error in item of 90 ft. 14″ 4-ply cotton belt, $30.33 each, should be $27.54, or $2.79 on 18 machines	50.22	2,500.74
Total profits		$9,352.90

[273]

3. OVERHEAD EXPENSES OF THE DEFENDANT PARKER, TO BE ALLOWED HIM AND DEDUCTED FROM THE PROFITS WHICH OTHERWISE HE WOULD HAVE MADE FROM THE MANUFACTURE AND SALE OF THE INFRINGING MACHINES EXCEPT THEREFOR.

No allowance having been made to the defendant Parker in the foregoing accounting because of overhead expense of the defendant in the manufacture of the infringing machines, a certain allowance should be made on this account.

Where either the plaintiff or the defndant is engaged in a general business and the patented invention constitutes only one department of his manufacture or sales, the expenses of the business must be apportioned in the ratio of the respective cost of production and sales of the infringing and the non-infringing articles, and the apportionment of the former charged as the expenses of their sale. Both the plaintiff and the defendant were engaged in the general manufacture and sale of packing-house supplies, and each did a large and extensive business at Riverside, California. The portion of the overhead charges, or the expenses of the business of the defendant, which the manufacture and sale of the infringing machines is to the entire business of the defendant during the time of the infringement, should be credited upon the profits which we have heretofore found as having been made by the defendant because of his manufacture and sale of the infringing machines in question.

For the purpose of determining what this overhead charge of the business of the defendant was, and for which he is entitled to receive a credit, a stipulation was entered into between the parties hereto which appears in the reporter's transcript of the record herein on pages 121–123. [274]

The entire gross expense of running the business of

the defendant was given, and also the gross receipts of the entire business and the gross receipts from the manufacture of the infringing device, and it was stipulated that the master should make the proper and just apportionment of overhead expenses that should be borne in the manufacture of the infringing device. The overhead expense of the defendant Parker during the period from March, 1912, to and including March, 1913, including such items as are set forth in an account or statement F, filed herein, amounted to $8,684.59; while the gross business of said Parker during said time amounted to the sum of $83,000.00. During the period of April, 1913, to and including April, 1914, the overhead expense of said defendant Parker's said business, including therein such items as are set forth in the overhead statement accompanying defendant Parker's supplemental report, amounted to $7,469.45; and the defendant Parker's business during the said time was $120,840.00. This was stipulated to.

The stipulation reserved the objection to the items as to whether the particular item was allowable, but not objecting to the amounts of such items. It was stipulated with relation to the volume of business that the gross overhead expense for the period between March, 1912, to and including March, 1913, should be taken as the average of the overhead expense during the period covered by the first and original statement of account filed on behalf of the defendant Parker herein, as the volume of gross business per year.

In view of this stipulation, not being able to ascer-

tain the items that go to make up the gross overhead expense of the defendant Parker during either of the times mentioned, I have assumed that the figures given of overhead expense accurately stated the gross overhead expense of the business of the defendant Parker during the several times hereinbefore mentioned. [275]

Allowing that the gross overhead expense of the defendant Parker for each of the three and a half years preceding March 1, 1913, *were* $8,684.59 per annum, and that he transacted a business each year during that time of $83,000.00, and that during the period from April, 1913, to April, 1914, his gross overhead expense was $7,469.45, and his gross business, $120,840.00, I have calculated that his overhead expense averaged .094 per cent of his business, and that his overhead expense of manufacturing the infringing machines was .094 of the total amount of the selling price of the machines and sets or rolls sold during that time, $43724.00, namely, $4120.05.

This should be deducted from the profits which the defendant otherwise would have made from the infringing device, leaving a net profit to defendant from the manufacture of the infringing machines and the sale of rolls of $5232.85. This will more concisely appear by a tabulated statement, Schedule B, as follows:

Exhibit "B" [to Report of Special Master on Accounting].

Stipulation.

For period March, 1912, to March, 1913:

Gross Business $83,000.00

Overhead Expense. ..... 8684.59—.1046 per cent of business.

For period April, 1913, to April, 1914:

Gross Business $120,840.00

Overhead Expense .... 7,469.45—.0617 per cent of business.

For 4½ years, September 1, 1909, to March 1, 1913:

Gross Business $332,000.00

Overhead Expense .... 38,317.22—.1046 per cent of business.

[276]

For period April 1, 1913, to March 1, 1914:

Gross Business .....,$120,840.00

Overhead Expense 7,469.49

Total Gross Business.. 452,840.00

Total Overhead Expense 45,786.67—.094 per cent of business.

Selling price of machines sold:

72 whole Sizers at $425. 6.00 each.....	$30,600.00
13 half Sizers at $285.00 each.....	3705.00
4 machines sold for use in Porto Rico...	1199.00
18 machines of "Modified Parker" type at $400.00 each	7200.00
2 half Sizers including belt etc.....	585.00
Amount received for 9 whole sets and 3 half sets of rolls.....	435.00
	$43,724.00

Overhead expense .0914 of sales	$43724.00	4,120.05
Total gross profits made by the defendant as heretofore found, schedule "A"....	$9,352.90	
Less overhead expense.....	4,120.05	
Net profits to defendant for manufacture of infringing machines	$5,232.85	[277]

4. AS TO THE DAMAGES TO BE ASSESSED AGAINST THE DEFENDANT PARKER BY REASON OF HIS INFRINGEMENT OF PLAINTIFF'S PATENT:

Damages are given as compensation for the injury actually reciever by the plaintiff from the defendant. They must fully compensate the plaintiff for his injury sustained, but must be the result of the injury alleged, and the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less. (Birdsall v. Coolidge, 93 U. S. 64.)

The defendant should make good the depreciation in the value of the plaintiff's enjoyment and use of the invention which his own wrongful act has caused. The exclusive enjoyment of the plaintiff in his patent in this case, consisted in the manufacture and sale of the patented articles. The pecuniary value to the plaintiff is represented by the difference between the expense of his production and the price he could have obtained, and the damage sustained by the plaintiff in his being deprived of this pecuniary value. There is no presumption, either of law or fact, that the plaintiff has lost or that the defendant has gained, or that the defendant's advantage is equal to the plain-

tiff's loss. It was shown in this case, that the plaintiff was ready and able to supply the market with the machines, and it is a fair inference that he would have sold all that the defendant sold; in fact, he was asked *ti* bid on supplying most of the infringing machines. His facilities for manufacturing were equal to those of the defendant, and he had been in the business of supplying the market with graders and sizers under the patent prior to the infringement of the defendant. It may therefore be inferred that all who brought of the defendant would have bought from the plaintiff. Gould Mfg. Co. v. Cowing, *supra;* 3 Robinson on Patents, p. 342. [278]

It is established in this case what is the expense to the plaintiff in manufacturing and marketing the patented articles and they are less than the defendant's, and but for the infringement of the defendant, the plaintiff would have made the profits which have been received by the defendant, and in addition thereto would have made the difference between what it would have cost the plaintiff to manufacture the machines and what it did cost the defendant. This difference in cost to the plaintiff, and which he would have made over and above the defendant's profits, is the plaintiff's damages in this case. It is the injury which the plaintiff's business has suffered by reason of the defendant's acts.

Here also, as in estimating profits, if the article in question would have been unsalable without the infringing device, or if the defendant has so confused the profits derived from a sale of plaintiff's invention with the other portions of the device, and no

separate estimate of the profits can be made, the entire profit may be regarded as derived from the invention. But an examination of this record will show that the plaintiff in this case had a fixed price for the sale of sizers and half sizers, independent of the bins and distributing system. It is therefore, necessary to determine what his profit would have been if he had sold sizers to the number sold by the defendant Parker and what profit he would have made thereon and what was his loss, if any, by reason of the manufacture and sale of the infringing articles.

Manifestly, if the profits which the plaintiff would have derived from the sale of a like number of infringing machines, exceeded the profits derived by the defendant, the difference would be the plaintiff's damages. [279]

"In addition to such profits as the defendant has received, the plaintiff is also entitled to recover any excess which would have been included in his own profits, had he supplied the market with a similar amount and quality of goods. It being proved that he would have sold all that the defendant sold, and that his expense of manufacturing would not have been greater than that of the defendant, it follows that he would have derived an equal profit if his sales had been continued at the same prices. But if he could have made the articles at less expense, or sold them at a higher price than the defendant did, his loss exceeds the profit of the defendant by whatever sum may cover this difference between the profit which he would have realized and that which the defendant had obtained."

3 Robinson on Patents, pp. 356, 357.

This is the measure of the plaintiff's damages.

It appears from the testimony in this case, without contradiction, that the defendant Parker sold 72 whole sizers and 13 half-sizers under the Parker patent; that he also sold 2 full sizers and 2 half-sizers for shipment to Porto Rico; and that since the decree was entered he has sold 18 full sizers of the modified Parker device and 2 half-sizers. It would have cost plaintiff exclusive of overhead expense, as shown by complainant's Exhibit 5 filed herein, to manufacture such sizers $57.99 each, and his selling price therefor was $175.00 each. The net profit to the plaintiff, therefore, not including overhead expense hereafter referred to, on these 105 machines sold by the defendant Parker, would have been $12286.05, which constitutes the damages suffered by the plaintiff, if no profits were accounted for by said Parker. This will more concisely appear by a tabulated statement, Schedule C, as follows: [280]

Schedule C [to Report of Special Master on Accounting].

Selling price of 105 Sizers at $175.00 each,	$18375.00
Net manufacturing cost of 105 Sizers to plaintiff as shown by plaintiff's Exhibit "5" after deducting overhead expense of $3.50 each Sizer at $57.99 for each Sizer.....	6088.95
Net profit to plaintiff not including over head expense on 105 machines sold by the defendant if manufactured by the plaintiff	$12286.05

5. OVERHEAD EXPENSE OF THE DEFENDANT:

This profit of the plaintiff, however, is subject to a deduction on account of the overhead expense of the business of the plaintiff, to be added to the cost of manufacturing said sizers.

As the plaintiff, like the defendant, was engaged in the general manufacture and sale of packing-house supplies, the portion of the overhead charges or expense of the business of the plaintiff which the manufacture and sale of the infringing machines would have borne to his entire business during the time of the infringement should be credited upon the damages which we have heretofore found would have been sustained by the plaintiff because of the manufacture and sale by the defendant of the infringing machines in question.

As a stipulation was entered into with reference to the overhead expense of the defendant, as hereinbefore set forth, a like stipulation was made in regard to the overhead expense on account of the plaintiff, and the items thereof were agreed to and stipulated subject to the same objection as to the particular items being allowable or chargeable as overhead [281] expense, but no objection was made to the amount of such items.

Said statement of overhead expense on behalf of the plaintiff during the period from October 1, 1912, to and including October 1, 1913, being as follows:

Office supplies	$ 256.00
General expense	689.12
Office and labor expense	1989.73

Light, power and water	334.95
Taxes	192.75
Insurance	217.85
Depreciation on buildings values at $7050.00 at 2½%	176.25
Depreciation on machinery valued at $8049.97 at 5 %	402.30
Total	$ 4259.15
Gross business during said time	$95933.21

The sales of graders during said time amounted to $19065.00 and this is to be accepted as a general average upon which to compute the proportion of overhead expense due to the grader business, such overhead expense pro rata to be established by the master in accordance with the stipulation aforesaid.

The gross overhead expense of the plaintiff in his business is, therefore, .0444. The selling price of 105 sizers sold at $175.00 each, was $18,375.00. The overhead expense on these sales is, therefore, $815.85. This is to be deducted from the plaintiff's gross profits on 105 sizers sold by the defendant Parker, as shown on Schedule C as heretofore found, amounting to $12,286.05, leaving a net profit to the plaintiff from the manufacture and sale of 105 sizers, if he had manufactured and sold the same, of $11470.20. This will more concisely appear by a tabulated statement, Schedule D, as follows: [282]

Schedule D [to Report of Special Master on Accounting].

Stipulation for period Oct. 1, 1912 to Oct. 1, 1913.

Gross business	$95933.21	
Overhead expense	4259.15	
Overhead expense is therefore .0444 of business.		
Selling price of 105 Sizers sold at $175.00 each		$18375.00
Overhead expense .0444 of sales	$18375.00	815.85
Plaintiff's gross profits on 105 Sizers sold by the defendant Parker as shown by Schedule "B"	$12286.05	
Less overhead expense of	815.85	
Net profit to plaintiff from manufacture of 105 Sizers		$11470.20

6. DAMAGES TO BE DETERMINED BY DEDUCTION FROM PLAINTIFF'S PROFITS WHICH HE WOULD HAVE RECEIVED, OF THE PROFITS WHICH THE DEFENDANT PARKER MADE BY THE INFRINGING ACTS.

In determining the amount of the damages which the plaintiff has suffered by reason of defendant Parker's infringement of plaintiff's patent, the profits which the defendant Parker made from his infringing acts, being less than the amount of the profits which the plaintiff might have gained by the manufacture and sale of the same number of ma-

chines as were made by the defendant are to be subtracted from the amount of the gains which the plaintiff might have gained by supplying the demand for the machines supplied by the defendant Parker. [283]

It is not proper, however, to take the entire profits which the plaintiff would have made but for the infringement, and add thereto the defendant's profits. The damages do not consist solely in what profits the defendant made, but if the plantiff recovers from the defendant all the profits which the defendant made, and the damages which the plaintiff suffers by reason of the difference between what he could have manufactured the articles for at less expense than the defendant, or sold them at a higher price, the plaintiff is fully compensated by reason of the acts of infringement of the defendants.

In Westinghouse v. New York Air Brake, 131 Fed. 607, the Court said:

"The rule is clear that the profits which the complainant might have gained by supplying such demand are recoverable as damages which it suffered thereby. It is also clear that, if such sum exceeds the profits which the defendants gained, such profits can be enlarged until they equal the complainants' losses, but that the two amounts cannot be added together and charged up to the defendants."

It is, however, necessary, in this case that there should be full and complete award of damages given to the plaintiff because of the wrongful acts of the defendants, for it has been determined that the purchasers of these infringing machines shall be en-

titled, after the payment to the plaintiff of the profits which the defendant made and the damages which the plaintiff has sustained, to continue to employ the machines as if they had been purchased from the plaintiff.

It is contended by the plaintiff that he is entitled to recover all gains which he might have made by supplying the demand for the machines which were supplied by the defendant [284] Parker as an infringement of the plaintiff's patent, as damages, and that there should be added thereto all of the profits which the defendant Parker has gained by reason of his infringing plaintiff's patent, notwithstanding, the defendant's profits were less than the amount which the plaintiff would have made if he had been allowed to supply the market for the machines covered by plaintiff's patent without any infringement of his rights by the defendant Parker. This contention of the plaintiff is based upon a misconception of the opinion filed by the United States Circuit Court of Appeals on the 30th day of May, 1914, in this case. In that opinion, the Court said:

"The plaintiff derives his profits from the manufacture and sale of the fruit grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are, therefore, the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them,

the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself. This being true, a decree against the defendants for the profits which they received by reason of the sales of the infringing machines, together with whatever damages the plaintiff may have suffered by reason thereof, must be held to vest the right to the use of the machines in the defendants' vendees free from any further claim by the patentee. * * * [285]

"The plaintiff will under the decree be entitled to receive such profits as may be found to be due to him, as well as such damages as may be found to have been sustained by him, by reason of the acts of infringement of either of the defendants, without regard to the acts of infringement of the other."

In my opinion, this does not in any way change the well-settled rule of law that the total damages that might be suffered by the plaintiff and profits gained and received by the defendant are not to be added together and charged to the defendant.

The Circuit Court of Appeals did not determine that the damages suffered by the plaintiff were all of the gains that the plaintiff might have made if he had supplied the market with the number of infringing machines supplied by the defendant, but only asserted that in the final judgment, the plaintiff should receive full compensation for the use of the machines by the vendees of the defendant for such period as

they were capable of being used in the same manner and to the same extent as he would have done had he sold the machines himself; and when the plaintiff is awarded the profits and damages as above set forth, that is to say, all profits that the defendant derived from the sale of the machines and a sum equal in damages to the difference between these profits and what the plaintiff would have gained if he had sold the machines he is receiving the actual and full and actual compensation for the sale and use of said machines.

It must follow, therefore, that the plaintiff's damages in this case are the amount of profits which he would have made by the manufacture and sale of the machines which the defendant manufactured and sold, namely: the sum of $11,470.20, reduced [286] by the sum of $5,232.85, the net profits to the defendant from the manufacture and sale of the infringing machines, leaving a net balance of damages due the plaintiff from the defendant Parker of the sum of $6,237.35.

If the Court should determine that the damages found by the master were insufficient because of the willful infringement by the defendants of the plaintiff's patent, the Court has power, in its discretion, to enlarge the damages as is given to increase the damages found by verdicts in action at law, not exceeding three times the amount of the finding of the master.

7. I find that the defendants, the Riverside Heights Orange Growers' Association and George D. Parker, infringed the plaintiff's patent by the

purchase and use of (5) five grading machines, which the defendant Riverside Heights Orange Growers' Association purchased from the defendant Parker, and that the damage to the plaintiff by reason of said infringement was the sum of $585.05.

CONCLUSION: As a conclusion from the foregoing findings of fact, I find:

1. That the plaintiff should recover from the defendant George D. Parker, the sum of $5,232.85, the gains and profits which the defendant, George D. Parker, made and received from the manufacture and sale of the machines hereinbefore referred to in infringement of plaintiff's patent.

2. That plaintiff should have and recover from the defendant, George D. Parker, the sum of $6,237.35 damages which the said plaintiff suffered by reason of the defendant George D. Parker in infringing the plaintiff's patent as hereinbefore set forth.

3. That the plaintiff should have and recover from the defendants Parker and the Riverside Heights Orange Growers' [287] Association the sum of $585.05, the damages which the plaintiff suffered by reason of the infringement by said defendants of the said plaintiff's patent; said damages are, however, included in the damages heretofore awarded to the said plaintiff from said defendant Parker, and if paid by the said defendant Parker will satisfy this award made against the said defendants Parker and the said Riverside Heights Orange Growers' Association.

4. I find that the plaintiff is entitled to recover

from the defendants his costs and disbursements in this proceeding.

Respectfully submitted,

LYNN HELM,

Master.

(Pencil figures, etc., on inside of cover.)

[Endorsed]: C. C. 1562. In the District Court of the United States, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. In Equity. Cir. Ct. No. 1562. Master's Report. Filed Sep. 29, 1914, at 25 min, past 3 o'clock P. M. Lynn Helm, Referee. C. Meade, Clerk. F. R. Knox. Filed Oct. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Law Offices of Lynn Helm, 918 Title Insurance Building, Los Angeles, Cal.

(In pencil:) B. F. Bledsoe. [288]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

Complainant's Exceptions to the Report of the Special Master.

The exceptions taken by complainant to the Report of Lynn Helm, Esq., as Special Master, to whom this cause was referred by the Interlocutory Decree herein dated November 7th, 1913:

FIRST EXCEPTION: Complainant excepts to the finding, allowance or deduction of "overhead expense" of $4,120.05, or any other sum whatsoever, from the "gross profits" found to have been derived by the defendant Parker by the infringements covered by such report.

SECOND EXCEPTION: Complainant excepts to the conclusion and finding of the Master that the damage suffered by complainant by reason of loss of sales, due to the infringement herein, are to be measured, not by the sale as a whole as contracted for, but by simply the "sizers independent of the bins and distributing system."

THIRD EXCEPTION: Complainant excepts to the deduction of the sum of $815.85, or any other sum or amount whatsoever, as proportional "overhead expense" of complainant's grader or sizer [289] business; the Special Master should have found that any such "overhead expense" had been borne and paid by complainant and was lost to him; that complainant had suffered damage in that amount thereby, and any such "overhead expense" should not be deducted from the profits which would have accrued to complainant from the sales of the infringing machines and complainant had paid all the "overhead

expense'' of his business and the making and selling of such additional machines would have increased complainant's ''overhead expense'' of such business.

FOURTH EXCEPTION: Complainant excepts to the finding or conclusion of the Master that under the Interlocutory Decree herein, as construed by the Circuit Court of Appeals, complainant was not entitled to recover both the profits made by or accrued to the defendant Parker and the damage suffered by complainant; the Special Master should have found that complainant was entitled to both the profits and the damages.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant.

[Endorsed]: Cir. Ct. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn., and George D. Parker, Defendant. In Equity. Complainant's Exceptions to the Report of the Special Master. Filed Oct. 13, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [290]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Exceptions to Master's Report.

MASTER'S REPORT.

Exceptions taken by the defendants herein to the report filed in this Honorable Court on the 2d day of October, 1914, by Lynn Helm, Esq., appointed Special Master of this court, to whom this cause was referred by an order of this Court made and entered on the 7th day of November, 1913, to take and state an account of the gains, profits and advantages which said above-named defendants and each of them have or has derived, received or made by reason of their infringement of the plaintiff's reissue letters patent No. 12,297, and to assess such damages against said defendants, and each of them, as plaintiff has sustained by reason of said infringement.

FIRST EXCEPTION: For that the said Master, in his said report on file herein, has found that since the date of the Interlocutory Decree entered in the above-entitled suit on the seventh day of November, 1913, one of the defendants herein, to wit,

George D. Parker, by the manufacture and sale of a differently constructed apparatus to the one adjudged to have infringed complainant's [291] reissue letters patent No. 12,297, has further infringed the plaintiff's said patented device, and found that for such new machines the said defendant—George D. Parker was liable unto the plaintiff for profits derived therefrom, and in addition thereto for damages unto the said complainant, whereas the said Master, under the evidence presented and in accordance with the law, should have found and reported unto this Honorable Court that the said device, specifically referred to on pages 3, 4, 5, 6, and 7 of the said report, so manufactured and sold by the said defendant—George D. Parker, since the said seventh day of November, 1913, was substantially a different machine from the Parker machine held by the Court herein to have been an infringement of the complainant's said patented device, and that the same was not and did not constitute an infringement of the said reissue letters patent No. 12,297, and should not have allowed any profits and damages unto the complainant by reason of the said manufacture and sale of the said new fruit grader so manufactured and sold by the defendant—George D. Parker, since the date of the said Interlocutory Decree herein.

SECOND EXCEPTION: For that the said Master, in his said report found that the plaintiff should recover from the defendant, George D. Parker, the sum of $5,232.85, as gains and profits, and an additional sum of $6,237.35 as damages, or a total amount of $11,470.20, as profits, gains and damages due unto the

plaintiff herein, whereas the Master should have found and reported the liability of the defendant unto the plaintiff limited to the gains, profits and damages found from the evidence herein resulting from the machines manufactured and sold by the defendant—George D. Parker, and held by the Court herein to have been an [292] infringement of the plaintiff's reissue letters patent No. 12,297.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSN.

GEORGE D. PARKER,

By N. A. ACKER,

Solicitor for Defendants.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Exceptions to Master's Report. Filed Oct. 20, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [293]

In the District Court of the United States in and for the Southern District of California, Southern Division.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Memorandum Opinion.

This matter comes before the Court upon the exceptions taken by both complainant and defendants to the report of the Special Master herein.

All the exceptions have received my careful attention, but owing to other demands upon my time, it will have to suffice that I merely indicate my conclusions in very general language.

Both of the exceptions of the defendants referring to the question of the infringement by the defendants of the so-called modified Parker machine, in my judgment, are not sustained.

From a careful consideration of the decision of the Circuit Court of Appeals in 205 Federal, together with the description by the Master of the so-called modified Parker grader, the Court is of the opinion that the parts of the last-mentioned machine operate in substantially the same manner as to produce substantially the same result attained by plaintiff's invention, and that, as I understand it, is sufficient to justify, and in fact require, the Master to make a finding of infringement. Both of defendant's exceptions, therefore, are overruled.

Complainant's first exception, with respect to overhead expense allowed defendants is overruled. While the proof may not be as clear upon this point as the Court could well wish it were, nevertheless it is apparent that some considerable overhead expense resulting from the conduct of defendants' business must have inured to the benefit of the graders manufactured by him [294] and it would seem as if

the allowance made by the Master is a reasonable one, and one which, under the evidence, is fairly deducible therefrom.

The second exception presents more difficulty, and yet I am constrained to overrule it. *Prima facie,* as I understand it, the *quantum* of damages suffered by complainant would be determined by the actual loss occasioned to him because of his inability to make the sales of his patented device resulting from the sale of such device by the infringing defendants. That the patented device was but a member of a combination machine, so to speak, would not ordinarily entitle the complainant to a recovery by way of damages as for inability to manufacture and vend the combination machine *it* its entirety. Presumbaly his loss is the loss occasioned because of his inability to vend the patented article, and as I understand it, it is only in those instances in which it is impossible to apportion the actual loss that the Courts have permitted damages to be based upon a sale of a combination of elements. In this case it does appear, as clearly indicated by the Master, that the complainant sold his patented device, as differentiated from the fruit grader in its entirety, by itself, and for a certain fixed sum. In my judgment, this estops him now to claim that his damages should not be computed upon such selling price of the patented device by itself.

The third exception of complaint with reference to a proposed disallowance of overhead expense deducted from the manufacturing cost of his fruit sizers is overruled. Complainant's contention in this

behalf is that it would have cost him no more to have manufactured the graders made and sold by the defendants, and that his overhead expense would not have been increased at all thereby. This is equivalent in logic to saying that because a man has an established business he can do ten [295] times as much business as in fact he does do with no additional overhead expense. This is obviously a *non sequitur.* The disallowance as for overhead expense on part of complainant seems a reasonable one and justified by the facts.

Complainant in his fourth exception urges that under the rule of law as enunciated by the Circuit Court of Appeals, in its decision in this case on a former hearing, and which rule has become the law in the case, he is entitled to both damages and profits in a larger degree than as estimated by the Master. With this contention, I cannot agree. The decision of the Circuit Court of Appeals, to me, does not mean that complainant is entitled to anything in the way of relief other than that usually accorded in cases of this kind. I understand the general rule to be that upon an infringement being shown, the defendant will be required to divest himself of all profit he may have made because of such infringement, and that this profit inures to benefit of complainant. In addition, if such profit so inuring to complainant does not suffice to recompense complainant for all damage he may have suffered, he will be entitled to a judgment for damages for the difference. This, substantially, *it* what was done by the Master. It does appear that after the decision in this case heretofore,

and after the injunction herein had issued, the defendant continued to go ahead and make and vend machines, which infringed the invention of the complainant. In my judgment, an award sufficient merely to compensate the complainant for the damage suffered by him because of this wilful infringement, does not meet the equities of the case, and I think, under the authority granted by Section 4919, Revised Statutes, and increase in damages should be allowed. The proof shows that defendant Parker has made and sold twenty of the infringing machines since the issuance of the injunction herein, and that the damages occasioned to the complainant by reason thereof, computed according to the Master's schedule amounts to $2,340.20. I do not conceive that [296] the circumstances are of the most aggravated character, and in consequence, feel that a doubling of the damages last mentioned will suffice to meet all the requirements of the case.

The report of the Special Master is thereof approved in its entirety. His allowance of damages and profits to complainant in the sum of $11,470.20 is confirmed, and in addition, judgment will be awarded against the defendant Parker for $2,340.20, because of the infringement occurring after the making of the injunction order herein. Complainant's counsel will prepare a decree in accord with the views herein expressed.

BLEDSOE,
Judge.

October 25th, 1915.

[Endorsed]: C. C. No. 1562. In the District Court of the United States for the Southern District of California. Fred Stebler vs. Riverside Heights Orange Growers' Assn. and George D. Parker. Filed Oct. 25, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [297]

[Minutes of Court, — October 25, 1915 — Order Confirming Report of Special Master, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

C. C. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision on an application for the confirmation of the report of the Special Master, and also upon exceptions taken by both

complainant and defendants to said report; the Court, having duly considered the same and being fully advised in the premises, now hands down an opinion, and it is in accordance therewith ordered that the report of the Special Master be, and the same hereby is approved in its entirety, and it is further ordered that the allowance by said Special Master of damages and profits to complainant in the sum of $11,470.20, be, and the same hereby is confirmed, and it is further ordered that, in addition thereto, there be awarded the complainant against defendant George D. Parker judgment for $2,340.20 because of infringement occurring after the making of the injunction order herein. **[298]**

[Endorsed]: C. C. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Copy of Minute Order. Filed Oct. 30, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. **[299]**

[Final Decree.]

United States District Court, Southern District of California, Southern Division.

IN EQUITY–CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

This cause having come on to be heard upon the report of Lynn Helm, Esq., as Special Master, which report is dated September 29, 1914, and also upon exceptions taken to said report on the part of complainant and also on the part of defendants and having been argued by Frederick S. Lyon, Esq., on behalf of complainant and N. A. Acker, Esq., upon behalf of defendants;

First. It is ordered, adjudged and decreed that the defendants Riverside Heights Orange Growers' Association and George D. Parker jointly and severally, pay to complainant, Fred Stebler, the sum of Six Hundred and Twenty-nine Dollars and Fifty-two Cents ($629.52), which is the amount found by the Special Master as stated in his report above referred to to be due from said defendants jointly as damages from the said defendants to the said complainant.

Second. It is further ordered, adjudged and decreed that the defendant, George D. Parker, further pay to complainant Fred Stebler, the sum of Fourteen Thousand and Fifty-three Dollars [300] and Eight Cents ($14,053.08), which is the amount found by the Special Master as stated in his above report referred to to be due from the defendant, George D. Parker, individually, to complainant as profits and damages respectively including the allowance of Two Thousand Three Hundred and Forty Dollars and Twenty Cents ($2,340.20) damages allowed by the Court as increase of damages in view of willful infringement.

Third. It is further ordered, adjudged and de-

creed that The United States Fidelity and Guaranty Company, surety, on the bond of the defendants, pay to complainant the sum of Ten Thousand Dollars ($10,000), the amount of the penalty or obligation of its said bond, and that when so paid by said The United States Fidelity and Guaranty Company as surety, such payment be applied in partial satisfaction of the aforesaid judgments against defendants.

Fourth. It is further ordered, adjudged and decreed that defendants and each of them pay to complainant, Fred Stebler, the sum of 805.35 Dollars, complainant's costs and disbursements herein, including in such costs and disbursements the Master's fee as heretofore fixed and allowed by the Court.

By the Court.
BENJAMIN F. BLEDSOE,
District Judge.

Dated October 30, 1915.

Decree presented, signed and filed and recorded.
WM. M. VAN DYKE,
Clerk.
By T. F. Green,
Deputy Clerk. [301]

[Endorsed]: C. C. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. In Equity. Final Decree. Filed Oct. 30, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Counsel for Complainant.

[Enrolled Papers Endorsed]: C. C. No. 1562. In the District Court of the United States, for the Southern District of California, Southern Division. Fred Stebler vs. Riverside Heights Orange Growers' Assn. et al. Enrolled Papers. Filed Oct. 30, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [302]

MEMORANDUM.

This satisfaction of judgment appears in the margin, at the end of the Final Decree entered on page 76 of the Equity Journal, Southern Division, Volume 3:

"Received full and entire satisfaction on the within judgments this 8th day of November, 1915, as to George D. Parker, Riverside Heights Orange Growers' Association and United States Fidelity & Guaranty Co.

FREDERICK S. LYON,
Solicitor for Complainant.

Witnesses:

WM. M. VAN DYKE,
Clerk,
By R. S. Zimmerman,
Deputy." [303]

United States District Court, Southern District of of California, Southern Division.

IN EQUITY–CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

Petition for Order Allowing Appeal.

The defendants, Riverside Heights Orange Growers' Association and George D. Parker, conceiving themselves aggrieved by the Final Order of Decree made and entered by said Court in the above-entitled cause on October 30th, 1915, affirming the Master's Report and granting judgment thereon as in said Decree set forth, come now, by their counsel, and petition said Court for an order allowing them to prosecute an appeal from said decree granting, allowing and affirming the Master's report and granting judgment thereon, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the sum of security which the plaintiffs shall give and furnish upon such appeal.

And your petitioners will ever pray.

N. A. ACKER,

Solicitor and of Counsel for Defendants. **[304]**

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, and George D. Parker, Defendants. Petition for Order Allowing Appeal. Filed Nov. 29, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [305]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Assignment of Errors.

Comes now the defendants, Riverside Heights Orange Growers' Association and George D. Parker, above-named defendants, and specify and assign the following as the errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree entered in the above-entitled suit on the 30th day of October, 1915, affirming the Master's Report and granting, allowing and awarding judgment

against the defendants herein as set forth in the said Decree.

That said District Court of the United States in and for the Southern District of California, Southern *District,* erred as follows:

1. In refusing to sustain defendants' exceptions to the Master's report referring to the question of infringement of the so-called modified Parker machine.

2. In allowing the complainant damages in excess of nominal damages.

3. In allowing the complainant a sum greater **[306]** than the profits derived by the defendants from the infringing machines.

4. In sustaining and approving the Special Master's report in its entirety.

5. In awarding unto the complainant judgment for the sum of $2,340.20 in addition to the sum of $11,470.20, found by the Special Master to be due unto the complainant as combined damages and profits.

6. In holding the so-called Parker modified machine to be an infringement of complainant's patent.

7. In holding that the Special Master was justified or required to make a finding of infringement with *regard the* so-called modified Parker Grader.

In order that the foregoing Assignment of Errors may be and appear of record the defendants' present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws of the United States made and provided.

Wherefore, the said defendants pray that said

final Decree and Order of October 30th, 1915, in said cause against the defendants be reversed, and that the United States District Court for the Southern District of California, Southern Division, be directed to enter an order setting aside the said decree, and that the defendants have and recover of plaintiff their costs and disbursements herein.

All of which is respectfully submitted.

N. A. ACKER,
Solicitor and of Counsel for Defts.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Assignment of Errors. Filed Nov. 29, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. **[307]**

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Order Allowing Appeal.

At a stated term, to wit, the July term, A. D. 1915, of the United States District Court, Southern District of California, Southern Division, held at the courtroom of said court in the city of Los Angeles, County of Los Angeles, on the 29th day of November, 1915.

Present: The Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, Southern Division, sitting in equity.

On motion of Nicholas A. Acker, Esq., solicitor and of counsel for defendants, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit as prayed for in the Petition for Order Allowing Appeal from the final decree heretofore filed and entered, affirming the Master's Report and granting Judgment thereon as set forth in said Decree herein, be, and the same is hereby granted.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, the same to act as bond for cost.

OSCAR A. TRIPPET,
District Judge.

Dated Nov. 29, 1915. **[308]**

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Order Allowing Appeal. Filed Nov.

29, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. **[309]**

United States District Court, Southern District of California, Southern Division.

IN EQUITY—CIR. CT. #1562.

FRED STEBLER,

Plaintiff,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That the Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in the State of California is held and firmly bound unto Fred Stebler, plaintiff in the above-entitled suit, in the penal sum of Five Hundred Dollars ($500) to be paid to the said Fred Stebler, his heirs, assigns and legal representatives, for which payment, well and truly to be made, the Fidelity & Deposit Company of Maryland, binds itself, its successors, and assigns firmly by these presents.

Sealed with corporate seal and dated this 20th day of December, 1915.

The condition of the above obligation is such that whereas the said Riverside Heights Orange Growers' Association and George D. Parker, defendants in the above-entitled suit, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the final order or decree made, rendered and entered on the 30th day of October, 1915, by the District Court of the United States, for the **[310]** Southern District of California, Southern Division, in the above-entitled cause by the said Court affirming the Master's Report on accounting had in the above-entitled suit.

NOW, THEREFORE, the condition of the above obligation is such that if the above-named defendants shall prosecute their said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] By J. HOMER NISHWITZ,
Attorney in Fact.
Attest: JOE CRIDER, Jr.,
Agent.

Approved 12/20/15.

TRIPPET,
District Judge.

State of California,
County of Los Angeles,—ss.

On this 20th day of December, 1915, before me, C. M. Evarts, a notary public in and for the said county

of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared J. Homer Nishwitz, known to me to be the attorney in fact, and Joe Crider, Jr., known to me to be the agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as attorney in fact and agent, respectively.

[Seal] C. M. EVARTS,
Notary Public in and for the County of Los Angeles, State of California. **[311]**

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Plaintiff, vs. Riverside Heights Orange Growers' Association, and George D. Parker, Defendants. Bond on Appeal. Filed Dec. 20, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. **[312]**

UNITED STATES OF AMERICA,

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

IN EQUITY—CIR. CT., No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please prepare as a transcript of record on the Appeal in this suit by defendants from the Order or Decree of October 30th, 1915, a copy of each of the following, and duly certify the same as transcript on appeal, in accordance with the Equity Rules of the Supreme Court of the United States: The Bill of Complaint. The Answer of Defendants. Decree of Lower Court Dismissing Bill. Decision of the Circuit Court of Appeals Reversing the Lower Court. Interlocutory Decree in Conformity with the Decision of the Circuit Court of Appeals. Testimony Given Before the Master on Accounting. Exceptions of Defendants to the Master's Report on Accounting. Report of the Special Master on Accounting. Exceptions of the Complainant to the Master's Report. Opinion of the Court Affirming

the Master's Report on Accounting. Final Decree Affirming the Master's Report, Granting, Allowing and Awarding Judgment. Satisfaction of Judgment. Petition for Order Allowing Appeal from Final Decree. Assignment of Errors. Order Allowing Appeal. Bond on Appeal. Citation.

N. A. ACKER,
Sol. for Defendants.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Praecipe for Transcript on Appeal. Filed Dec. 27, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. **[313]**

[Certificate of Clerk, U. S. District Court, to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. 1562.

FRED STEBLER,
Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER and PARKER MACHINE WORKS,
Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing three hundred and thirteen (313) typewritten pages, numbered from 1 to 313, inclusive, to be a full, true and correct copy of Bill of Complaint, Answer, Final Decree, Mandate of the Circuit Court of Appeals Reversing the Lower Court, Interlocutory Decree in Conformity with Mandate of the Circuit Court of Appeals, with Notice of Motion for Presentation and Signing of Decree Attached, Testimony and Proceedings Before Special Master on Accounting, and Exhibits Filed by Special Master, Report of Special Master on Accounting, Complainant's Exceptions to Report of Special Master, Defendants' Exceptions to Report of Special Master, Opinion of Court Affirming Report of Special Master, Minute Order of Court Affirming Report of Special Master, Final Decree **[314]** Affirming Report of Special Master, Satisfaction of Judgment, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, and Praecipe for Transcript on Appeal, in the above and therein entitled cause, and that the same together constitute the Transcript upon Appeal of the Riverside Heights Orange Growers' Association and George D. Parker in accordance with the Praecipe for Preparation of Transcript filed in my office on behalf of the appellants by their solicitor of record.

I do further certify that the cost of the foregoing Transcript on Appeal is $168.30, the amount whereof has been paid me by said appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 28th day of March, in the year of our Lord, one thousand nine hundred and sixteen, and of our Independence, the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk. **[315]**

[Ten Cent Internal Revenue Stamp. Canceled 3/28/16. L. S. C.]

[Endorsed]: No. 2772. United States Circuit Court of Appeals for the Ninth Circuit. Riverside Heights Orange Growers' Association, a Corporation, and George D. Parker, Appellants, vs. Fred Stebler, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 30, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Order Under Rule 16 Enlarging Time to March 31, 1916, to File Record and Docket Cause.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,
Appellants,

vs.

FRED STEBLER,
Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 31st day of March, 1916.

Dated at Los Angeles, January 27th, 1916.

BLEDSOE,
U. S. District Judge, Southern District of California.

[Endorsed]: No. 2772. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 31, 1916, to File Record Thereof and to Docket Case. Filed Jan. 27, 1916. F. D. Monckton, Clerk. Refiled Mar. 30, 1916. F. D. Monckton, Clerk.

No. 2772

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, a Corporation, and GEORGE D. PARKER,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2772

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, a Corporation, and GEORGE D. PARKER,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys.

For Appellant:

FREDERICK S. LYON, Esq., Merchants Trust Building, Los Angeles, California.

For Appellees:

NICHOLAS A. ACKER, Esq., Foxcroft Building, San Francisco, California. [3*]

Citation [on Appeal].

UNITED STATES OF AMERICA,—ss.

The President of the United States to Riverside Heights Orange Growers' Association and George D. Parker, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal rendered and of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, in suit in Equity, Cir. Ct. No. 1562 therein, and wherein you are defendants and appellees and Fred Stebler is the complainaint and appellant, to show cause, if any there be, why the decree of said court made and entered on October 30th, 1915, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET,

*Page-number appearing at foot of page of original certified Record.

United States District Judge for the Southern District of California, Southern Division, this 18th day of February, 1916.

OSCAR TRIPPET,
United States District Judge.

Due service of a copy of the above Citation is hereby acknowledged this 25 day of February, 1916.

N. A. ACKER,
Solicitor for Defendants and Appellees. [4]

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California. Fred Stebler v. Riverside Heights Orange Growers' Association, et al. Citation. Filed Feb. 28, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C.—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER, and PARKER MACHINE WORKS,

Defendants. [5]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Stipulation [Re Transcript of Record, etc.].

The defendants in the above-entitled suit having heretofore taken an appeal from the Final Decree of this court in said suit dated, made and entered October 30, 1915, and having caused a transcript of record therein on said appeal to be prepared and certified for filing in the United States Circuit Court of Appeals for the Ninth Circuit, and said transcript of record containing and embodying the proofs taken before the Special Master on the accounting herein and complainant having now taken an appeal from the said Decree to the same court and involving questions to be determined upon the proceedings and proofs educed before said Special Master all of which form a part of said transcript of record so prepared on defendant's said appeal;

It is hereby stipulated and agreed by and between the parties that complainant's appeal from said Decree be heard, submitted and determined upon the said transcript of record [6] thus avoiding ex-

pense to the parties and that the said appeal be heard and submitted at one and the same hearing.

FREDERICK S. LYON,
Solicitor for Complainant.
N. A. ACKER,
Solicitor for Defendants.

[Endorsed]: No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Plaintiff, vs. Riverside Heights Orange Growers' Assn., *et ano.,* Defendants. In Equity. Stipulation. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitors for Plaintiff. [7]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant.

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, and GEORGE D. PARKER,

Defendants.

Petition for Order Allowing Appeal.

The complainant, Fred Stebler, conceiving himself *aggreived* by the Final Order or Decree made and entered by said Court in the above-entitled cause on October 30th, 1915, confirming the Master's Report

and granting judgment thereon as in said decree set forth, comes now and petitions said Court for an order allowing him to prosecute an appeal from said order or decree the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided and also that an order be made fixing the sum of security which complainant shall give and furnish upon such appeal.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant.

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn., *et ano.*, Defendants. In Equity. Petition for Order Allowing Appeal. Filed Feb. 14, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal. Solicitor for Complainant. [8]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant.

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Assignment of Error.

COMES NOW the complainant above named and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on October 30th, 1915, confirming the Master's Report and granting allowing and awarding judgment against defendants as in said decree set forth: That the District Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred as follows:

1. In overruling and in not sustaining complainant's first exception to the report of the Special Master herein and in not excluding the allowance or deduction of "overhead expense" as in said exception set forth.

2. In overruling and in not sustaining complainant's second exception to the report of the Special Master herein [9] and in not awarding to complainant the full profits realized by defendants and each of them from the infringements herein and the full damages suffered by the complainant by reason of defendants' infringement; and in apportioning such profits and damages to simply the "sizers independent of the bins and distribtuting system" and in not ascertaining said profits and damages upon the infringing machines as a whole.

3. In overruling and in not sustaining complainant's third exception to the Master's Report.

4. In overruling and in not sustaining complain-

ant's fourth exception to the Master's Report.

In order that the foregoing assignments of error may appear of record the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE complainant prays that the said final decree of this Court made and entered on October 30th, 1915, be reversed and that the United States District Court for the Southern District of California, Southern Division, be directed to modify the said Decree in accordance with the exceptions of complainant to said Master's Report and in accordance with each of said exceptions.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant. [10]

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn., *et ano.*, Defendants. In Equity. Assignments of Error. Filed Feb. 14, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [11]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Order Allowing Appeal.

In the above-entitled cause the complainant having filed his petition for an order allowing an appeal from the final decree of this Court made and entered on October 30th, 1915, confirming the Master's Report, and granting and allowing and awarding judgment against the defendants herein as in said decree set forth, together with assignments of error;

Now upon motion of Frederick S. Lyon, Esq., Solicitor for complainant, it is ordered that said appeal be and hereby is allowed the complainant to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered as aforesaid and that the amount of complainant's bond on said appeal be and the same is hereby fixed at the sum of $250 the same to act as a a bond for costs upon the said appeal. [12]

Dated February 14th, 1916.

TRIPPET,
District Judge.

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn., *et ano.*, Defendants. In Equity. Order Allowing Appeal. Filed Feb. 14, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. **[13]**

United States District Court, Southern District of California, Southern Division.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Riverside Heights Orange Growers' Association and George D. Parker, defendants, in the above-entitled suit, in the penal sum of Two Hundred and Fifty Dollars ($250), to be paid to

the said Riverside Heights Orange Growers' Association and George D. Parker, their heirs and assigns, for which payment, well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors, and assigns firmly by these presents.

Sealed with corporate seal and dated this 15th day of February, 1916.

The condition of the above obligation is such that whereas the said Fred Stebler, complainant in the above-entitled suit, is about to take an appeal to the United States Circuit [14] Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 30th day of October, 1915, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause confirming the report of the Special Master in said cause and granting judgment thereon as in said decree set forth,

NOW, THEREFORE, the condition of the above obligation is such that if Fred Stebler shall prosecute his said appeal to effect and answer all costs which may be adjudged against him if he fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT CO. OF MARYLAND.

By HARRY D. VANDEVEER,

[Seal] Attest: J. HOMER NISHWITZ,

Agent.

State of California,
County of Los Angeles,—ss.

On this 15th day of February, 1916, before me C. M. Evarts, a notary public in and for the said county of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandeveer, known to me to be the attorney in fact, and J. Homer Nishwitz, known to me to be the agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit **[15]** Company of Maryland thereto and their own names as attorney in fact and agent, respectively.

[Seal] E. M. EVARTS,
Notary Public in and for the County of Los Angeles, State of California.

Approved 2/18/16.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn. *et ano.,* Defendants. In Equity. Bond on Appeal. The Within Bond and Surety Thereon is Hereby Approved *This Day* of February, 1916. ————, District Judge. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. Filed Feb. 18, 1916. Wm. M Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[16]**

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Defendants.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue a transcript of record on appeal in the above-entitled suit in accordance with the order allowing complainant an appeal from the decree of October 30, 1915, in the above-entitled suit, consisting of certified copies of the following, to wit:

Petition for Order Allowing Appeal;

Assignments if Error;

Order Allowing Appeal;

Bond on Appeal;

Stipulation of the Parties, Hereto Attached.

FREDERICK S. LYON,

Solicitor for Complainant. **[17]**

Due service and a receipt of a copy of the fore-

going Praecipe is hereby admitted this 24 day of February, 1916.

N. A. ACKER,

Solicitor and of Counsel for Defendants and Appellees.

[Endorsed]: No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Assn., *et ano.*, Defendants. Praecipe for Transcript of Record. Fied Feb. 28, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[18]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C.—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION, GEORGE D. PARKER, and PARKER MACHINE WORKS,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing eighteen (18) typewritten pages, num-

bered from 1 to 18, inclusive, to be a full, true and correct copy of the Stipulation that complainant's appeal may be heard, submitted and determined upon Transcript of Record on Appeal of Defendants, Petition for Order Allowing Appeal, Assignments of Error, Order Allowing Appeal, Bond on Appeal, and Praecipe for Preparation of Transcript on Appeal, in the above and therein entitled cause, and that the same together constitute the Transcript upon Appeal of Fred Stebler, in accordance with the Praecipe for Preparation of Transcript filed in my office on behalf of the appellant by his solicitor of record.

I do further certify that the cost of the foregoing **[19]** Transcript on Appeal is $7 50/100, the amount whereof has been paid me by said appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 29th day of March, in the year of our Lord, one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Cancelled 3/29/16. C. N. W.] **[20]**

[Endorsed]: No. 2772. United States Circuit Court of Appeals for the Ninth Circuit. Fred Stebler, Appellant, vs. Riverside Heights Orange Growers' Association, a Corporation, and George D. Parker, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 30, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Order Extending Time to April 5, 1916, to File Record and Docket Cause.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION and GEORGE D. PARKER,

Appellees.

Good cause appearing therefor, it is hereby Ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is

hereby enlarged and extended to and including the 5th day of April, 1916.

Dated at Los Angeles, California, nunc pro tunc as of March 15, 1916.

OSCAR A. TRIPPET,
District Judge.

It is hereby stipulated that the above order may be made and entered nunc pro tunc as of March 15, 1916.

FREDERICK S. LYON,
Attorney for Appellant.
N. A. ACKER,
Attorney for Appellees.

[Endorsed]: No. 2772. United States Circuit Court of Appeals for the Ninth Circuit. Fred Stebler, Appellant, vs. Riverside Heights Orange Growers' Association et al., Appellees. Order Extending Time to File Record. Filed Mar. 31, 1916. F. D. Monckton, Clerk.

NO. 2772

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION AND GEORGE D. PARKER,

Appellants,

vs.

FRED STEBLER,

Appellee.

APPELLANTS' BRIEF.

N. A. ACKERD, Morckton,
Counsel for Appellants.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION AND GEORGE D. PARKER, Defendants, Appellants, vs. FRED STEBLER, Complainant, Appellee.	In Equity No. 2772

BRIEF OF APPELLANTS, RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION AND GEORGE D. PARKER.

This case comes before this court on an appeal from the final decree made and entered in the above entitled suit on the 30th day of October, 1915, by the District Court of the United States for the Southern District of California, Southern Division, affirming the Master's report and granting, allowing and awarding judgment against the Riverside Heights Orange Growers Association and George D. Parker herein, as set forth in the said decree.

For an understanding of the issues involved in the present appeal it is deemed advisable to give a brief

history of the litigation to the time of the entry of the final decree.

The suit in the lower court was an action for infringement of United States Reissue Letters Patent No. 12297 granted Robert Strain under date of December 27, 1904, for an Improved Fruit Grader, the same being a reissue of original Letters Patent No. 730412 granted June 9, 1903, said original Letters Patent and the Reissue Letters Patent having been duly assigned and transferred unto Fred Stebler, complainant to said action, the Bill of Complaint in said action having been filed on the 24th day of May, 1910. Answer was duly filed, testimony taken and final hearing had before his Honor Olin Wellborn, and decision rendered holding non-infringement of Claims 1 and 10 of the said Reissue Letters Patent, the same being the only claims involved.

The complainant in said action thereupon perfected an appeal to this court, which appeal was duly heard and decision rendered by this court reversing the lower court, which decision is reported in the 205 Fed., page 735.

Thereafter, and before a reference was had to the Master for an accounting, the complainant to said action, Fred Stebler, appellee herein, filed in the District Court for the Southern District of California, Southern Division, thirty-two or more suits against sundry defendant users of the infringing apparatus manufactured and sold by George D. Parker, one of the appellants herein, and one of the defendants in the main suit.

Motion was made before his Honor Olin Wellborn, for an order restraining the prosecution of said suits so filed against the users and for an injunction against the filing of additional suits against users of the infringing machine. This motion was duly heard and granted and an order made by his Honor Olin Wellborn restraining the prosecution of said suits and enjoining the filing or commencement of additional suits.

Thereafter an appeal was taken to this court from the order so made, and on hearing this court rendered its decision sustaining the decision of the lower court, which decision is reported in the 214 Fed., page 560.

After the rendition of said decision by this court reference to a Master was had for an accounting in the main suit and the Master rendered his report (Record page 284) to the court under date of the 29th day of September, 1915. The appellants herein filed exceptions to the Master's report, and equally so exceptions were taken on behalf of the complainant Fred Stebler, which exceptions were duly heard before his Honor Judge Bledsoe, who rendered a decision affirming the Master's report; and final decree was entered in the main suit No. 1562 on the 30th day of October, 1915. It is from this final decree that the present appeal is taken.

The assignment of errors appear on Record page 344.

The appellee Fred Stebler also perfected an appeal from the final decree of the lower court, and the assignment of errors of said party are set forth

on page 6 of the transcript of the record, filed on behalf of said Stebler in appeal Fred Stebler vs. Riverside Heights Orange Growers Association and George D. Parker, and wherein said Stebler appears as appellant.

Under stipulation entered into between counsel the two appeals from the said final decree are submitted to be heard and determined upon the transcript of record presented in the appeal Riverside Heights Orange Growers Association and George D. Parker vs. Fred Stebler, the record in said case constituting the record for the two appeal cases.

Consideration will first be given to the third assignment of errors filed on behalf of appellants, Riverside Heights Orange Growers Association and George D. Parker, which assignment is directed to error on the part of the lower court in allowing to complainant a sum greater than the profits derived by the defendants from the infringing machine.

The law is well settled that a complainant in an action for infringement, on an accounting is only entitled to receive from the defendant as profits, that sum which the defendant receives or derives from the infringing apparatus.

In the present case the owner of the Letters Patent in suit, appellee Fred Stebler, is a manufacturer of machinery generally adapted for use in houses devoted to the packing of fruit, and the machines so manufactured by him are sold directly to the users thereof. The grading or sizing machine cov-

ered by the Reissue Letters Patent No. 12297 constituted only one of the many forms and types of machines manufactured and sold by him for use in the packing houses. Equally so, George D. Parker, one of the defendants to the main suit, is a manufacturer of various types of machines and apparatus designed for use in the packing houses, and the infringing machine manufactured and sold by him is one of the various machines constituting the output of his manufacturing plant. Like appellee Stebler, appellant Parker disposed of the machines manufactured by him to the users direct. The Riverside Heights Orange Growers Association is not a manufacturer of machinery, but was a user of the fruit grading or sizing machines which it purchased from its co-defendant Parker, and which machines were held to be an infringement of the said Reissue Letters Patent.

It is our position that the only profit which the complainant, under the accounting, is entitled to receive from the defendants, is the profit which the defendant George D. Parker derived from the manufacture and sale of the infringing fruit sizer or grader.

The appellant Parker, one of the defendants in the lower court, placed the infringing machines on the market in combination with a fruit distributing system and bins of an adjustable type for receiving the sized or graded fruit; and, equally so, the appellee Fred Stebler, complainant in the lower court, placed the patented apparatus on the market in connection with a fruit distributing system and bins

of an adjustable type for receiving the sized or graded fruit.

So far as related to appellant Parker, the distributing system and the bins constituted unpatentable features which were open and free to him to use without payment or tribute of any kind being made to appellee Fred Stebler, complainant in the lower court; in other words, these constituted unpatented features of the appellant Parker's machine as placed on the market, and for such unpatented features he was not required to account. On the other hand, appellee Stebler, complainant in the lower court, placed the patented grader of the Reissue Letters Patent No. 12297 on the market in conjunction with the invention of United States Letter Patent No. 943799 granted unto him under date of December 21, 1909, for an Improved Distributing Apparatus, which said letters patent appear in the records herein as Defendants' Exhibit No. 7, Record page 273, but which letters patent were not involved in the suit for infringement in the lower court.

It is a rule of law controlling on an accounting that "the patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural and speculative."

Garretson vs. Clark, 111 U. S. 120.

"The complainant must affirmatively show what profits are due to his invention."

Tilghman vs. Proctor, 125 U. S. 136.
Bell vs. United States Stamping Co., 32 Fed. 549.
Ingersoll vs. Musgrove, 14 Blatch., 541.

There are decisions, however, holding that where the profits of the defendant derived from the patented structure and from unpatented features associated therewith are so intermixed and commingled that the defendant cannot separate the same, and that, due to the fact that the knowledge of the profit derived by the patented features over those derived from the unpatented features is peculiarly within the possession of the defendant, the burden is then placed on the defendant to segregate the profit derived from the patented feature from the profits derived from the unpatented features.

Having such a line of decisions in mind when appearing on the accounting, the appellant George D. Parker, one of the defendants in the lower court, gave testimony disclosing the sale of the infringing fruit sizer or grader, where made without the distributing apparatus and the bins for receiving the graded fruit, and he presented to the Master a schedule disclosing all sales which he had made. One of said schedules disclosed the cost of the fruit sizers or graders and the other of said schedules disclosed the cost price of the distributing apparatus including the adjustable bins for receiving the graded fruit.

The testimony before the Master and the Master's report, record page 284, disclosed that appellant

Parker had made and sold 72 of the whole or double infringing sizers or graders and 13 one-half sizers or graders of the infringing type, and the cost given by appellee Parker (Record Page 229) for producing and erecting each infringing whole sizer or grader amounted to the sum of $124.20, and the testimony of the said Parker in answer to Q. 228, that his selling price for the said sizers so installed would have been $175.00 (Record Page *171*). The testimony further disclosed (Record Page 77) in answer to Q. 170, that he had sold two of the infringing fruit sizers or graders for the sum of $210.00, making $105.00 per grader. These graders or sizers were shipped in a knocked down condition to Porto Rico, and therefore the said Parker was not put to the expense of installing said machines.

It will thus be seen from the testimony that defendant Parker was willing and did supply the fruit sizers or graders, whenever required, separate from the distributing system and bins, and, therefore, as he testified that his selling price for the said fruit sizer or grader installed and erected in the packing house would have been $175.00, the profit on said sizer or grader to the said Parker was the sum of $175.00 less $124.20, or $50.80, and it is this amount per sizer which the Master should have found due from the said Parker unto the appellee Stebler, less such deduction for overhead expenses as the Master found allowable.

On the one-half or single sizers the Master was probably correct in holding that appellant Parker was liable to appellee Stebler for the full profit

which he made on each one-half or single sizer and the distributing system and bins supplied and installed therewith, due to the fact that the testimony fails to disclose the price for which appellant Parker would have sold the one-half or single sizer distinct from the distributing system and bins. The single or one-half sizers with bins and distributing system, according to the Master's report (Page 297) sold for $225.00, and in accordance with the statement of the Master contained on said page, the cost of a single sizer was $94.04, plus $112.06 for the distributing system and bins installed therewith, making a total cost of $206.10 for a one-half sizer with its bins and distributing system. This amount deducted from the selling price of $225.00, as found by the Master, gives a profit of $18.90 for each single or one-half sizer. There were 13 of such sizers sold, and therefore the total profit derived by appellant Parker on the installed one-half sizers is the sum of $18.90 multiplied by 13 or $245.70. This amount added to the sum of $3,657.60, gives a total of $3,903.30 as the total profit derived by appellant Parker from the 72 whole sizers without the bins and distributing system and the 13 one-half sizers with the bins and distributing system. To this total should be added the sum of $1,110.58, errors found by the Master, as set forth in his report (Record Page 310), making a total of profits due from appellant Parker unto appellee Stebler of $5,013.88, less amount of overhead expense found allowable by the Master.

This constitutes the whole profits derived by the

said Parker for the manufacture and sale of the infringing 72 whole and 13 single or one-half fruit sizers or graders, and the Master should not have added to this sum the profit derived by the said Parker from the manufacture and sale of the distributing apparatus and fruit receiving bins associated with the said infringing whole fruit sizer or grader.

We submit that the said Parker fully complied with whatever burden may have been placed upon him under the law for the purpose of an accounting, when he disclosed the cost of the whole sizers and the selling price for which he would have sold them, and from these figures the profits of the fruit sizing apparatus unto him was readily determinable; and more especially so when the testimony disclosed that he had sold the fruit sizer separate from the distributing apparatus and the fruit receiving bins. However, should your Honors find that, due to the fact that he had sold all of the infringing machines with the exception of the two sold and shipped to Porto Rico, in conjunction with the independent distributing apparatus and fruit receiving bins, and that he is liable unto the appellee Stebler for the full profit which he made on the entire installation, we then submit that the total profit due from the said Parker unto the said Stebler is the sum of $6,852.16, found by the Master in his report, page 311, less the proportion of overhead expense found allowable by the Master, and which appears more fully in Schedule A of the Master's report (Record Page 310).

It is our contention that the total sum due from appellant Parker unto the appellee Stebler is the amount of profit which he derived from the whole sizers or graders *per se,* and that none of the profits which he derived from the unpatented distributing apparatus and bins installed therewith is entitled to be added to the profits received from the sizing apparatus itself. But in no event is he liable unto the appellee Stebler in a sum greater than that for which the Master found him to be liable as the profits derived from the patented sizer or grader combined with the profits derived from the unpatented distributing apparatus and fruit receiving bins. This sum should not exceed the sum of $6,852.16 found by the Master (Record page 311), less deductions for the proper proportion of overhead expense.

To place the matter in a simple form, it is our contention that appellee Stebler is entitled to receive from appellant Parker per each whole infringing sizer the sum of $175.00 less the cost of $124.20, or $50.80 for each whole sizer, and one-half of said amount for each one-half sizer, less the proportion of overhead expense found allowable by the Master. To which amount per whole sizer the sum of $13.20 found for corrections should be added and for each one-half sizer should be added the sum of $6.60.

Our second assignment of errors is that the court erred in allowing complainant damages in excess of nominal damages.

Relative to this assignment of errors, we submit

that the burden of proof is on the complainant under an accounting, to segregate his profits derived from the patented structure from those derived from the non-patented structures of the machinery as installed; and unless there has been such a segregation made before the Master, that the complainant in such case is entitled to only nominal damages.

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits *and the patentee's damages* between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural and speculative."

Garretson vs. Clark, 111 U. S. 120.

The complainant must affirmatively show what profits are due to his invention.

Tilghman vs. Proctor, 125 U. S. 136.
Bell vs. U. S. Stamping Co., 32 Fed. 549.
Ingersoll vs. Musgrove, 14 Blatch. 541.

An arbitrary award of one-half of the net profits on the whole article as due to the complainant's device is not proper, since the exact amount is to be ascertained by computation.

Calkins vs. Bertrand, 8 Fed. 755.

In the present case there is not one word of testimony on behalf of the complainant tending to separate the patented device from the unpatented feature, nor to segregate the profit which he derived from the grader proper from that derived from the non-patented features, nor does complainant's testi-

mony disclose any damage due to the manufacture and sale of the infringing patented device.

The apparatus as installed by the complainant is constructed under the protection afforded by the Strain Re-issue Letters Patent in suit relating to an improved grader, and United States Letters Patent No. 843799, relating to an improved distributing apparatus (defendant's Exhibit No. 7, Record Page 273), which said patented apparatus is conjoined by complainant for use in connection with the patented grader of the Strain Re-issue Letters Patent in suit—see testimony of complainant Stebler—answer to Q. 158, Record Page 158. Letters Patent No. 943799, covering the bins and distributing means for conveying the fruit from the patented grader in suit, is not herein involved.

Where the thing made and sold by the defendant contains not only the invention in suit of the complainant, but contains some other invention or feature not involved in the patented device, the complainant can recover only for that part of the defendant's profits, due to the patented part or feature of the article sold which is covered by the patent in suit. The burden of proving that portion of the profit which the patented feature bears to the whole of the profits derived from the manufactured article, is on the complainant.

Blake vs. Robertson, 94 U. S. 733.
Garretson vs. Clarke, 111 U. S. 120.
Dobson vs. Carpet Co., 114 U. S. 445.
Dobson vs. Dorman, 118 U. S. 17.

Keystone Mfg. Co. vs. Adams, 151 U. S. 147.

In the present case the defendant has not infringed Letters Patent No. 943799, defendant's Exhibit No. 7, and these letters patent are not involved and cover the bins and distributing means for receiving the graded fruit from the patented grader in suit, and distributing the same to the respective fruit receiving bins. These features are employed in the apparatus placed on the market by complainant in conjunction with the grader of the patent in suit, but the defendant herein is not liable to the complainant for the profits claimed by complainant for such independent patented features, merely due to the fact that the complainant elected to associate the two patented inventions. It was the duty of the complainant to separate his profit derived from the patented grader from those derived from the non-infringing features thereof, and which in each case cover the bins and distributing means.

Without considering all of the claims of said Letters Patent No. 943799, it will suffice to direct an examination of claims 2, 3, 4 and 5 thereof, in order to ascertain exactly what features of the manufactured and installed apparatus of the complainant is beyond the sphere of protection afforded by the infringed claims of the letters patent in suit, and such an examination clearly demonstrates that all of the manufactured article other than the grading element is outside of and beyond such protection, and on such features the complainant herein is not entitled to profits nor damages, and it is not the province of the Master to make an apportion-

ment of profits in the absence of testimony from the complainant making such just apportionment. This question has repeatedly been ruled on by the courts, not only in the case of Garretson vs. Clarke, supra, but in the earlier case of Blake vs. Robertson, supra, the Supreme Court using the following language:

> "But inventions covered by other patents were embraced in those machines. It was not shown how much of the profit was due to those other patents, nor how much of it was manufacturer's profit. The complainant was, therefore, entitled to only nominal damages. This the court gave him. It was all the state of the evidence warranted. It would have been error to give more."

As stated in Westinghouse vs. New York Air Brake Co., 140 Fed. 604:

> "These cases are exceedingly rare in which the whole marketable value of a machine, or of a collection of devices, can in reason be attributable to a patented feature which embraces merely an improvement in one of its parts. Marketable value is ordinarily the result of various conditions independent of the normal value of the machine itself, and the contribution which the patented part gives to marketable value is necessarily dependent more or less upon these conditions. Enterprise, exploitation, and business methods in introducing and marketing the thing are generally as important a factor in its intrinsic value."
>
> "But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have

> jointly, but unequally, contributed to the profits. In such cases if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' Garretson vs. Clark, 111 U. S. 120 (4 Sup. Ct. 291, 28 L. Ed. 371)."

According to the testimony of the complainant herein, (Record Page 102, answer to Q. 88), the patented grader would be useless without the bins and distributing means, consequently, the greater portion of the profits of the entire apparatus must have been attributable to the invention of Letters Patent No. 943799. Defendant's Exhibit No. 7, used conjointly by appellee Stebler with the grader of the letters patent in suit at the date of and ever since the defendant entered the field as a manufacturer of packing house machinery. Such being the case and patent No. 943799 not being herein involved and appellant Parker not liable under said letters patent, it was incumbent upon the complainant to show by clear and unmistakable testimony the profit due to the patented grader in suit and to segregate the same from the profit due to the invention of Letters Patent No. 943799 combined

therewith and, which profits appellee Stebler commingled. This has not been done in the present case and no effort made on the part of appellee Stebler so to do. He was, therefore, only entitled to nominal damages.

In the recent case of Seeger Refrigerator Co. vs. American Car & Foundry Co., 212 Fed. 742, the Master allowed the sum of $662,923.20 as the profit derived from the infringing act, which report was set aside by the court and only nominal damages allowed, due to the failure of the complainant to prove the profit directly attributable to the infringing feature over the whole profit derived from the manufacture and sale of the entire organized apparatus.

The patented device covered by the claims held to have been infringed in said case, like the device of the claims held to have been infringed in the present case, related to only a specific portion of the whole installed apparatus, the said claims reading as follows:

> 1. In a combined refrigerator and freezer, a suitable outside case, a refrigerating room and an ice bunker therein separated by a partition, inverted V-shaped ports in said partition leading from the refrigerating or freezing room into said ice bunker and ports leading through the bottom of said ice bunker and thence into the bottom of the refrigerating room, substantially as and for the purposes set forth.
>
> 2. In a combined refrigerator and freezer, a suitable outside case, a refrigerating or freezing room and an ice bunker therein separated from each other by a partition, inverted V-shaped

ports in said partition, the bottom of said ice bunker being perforated and in communication through said perforations with the refrigerating or freezing room, the floor beneath the ice bunker inclining downwardly toward the refrigerator or freezing room, and the ceiling of the refrigerating or freezing room inclining away from said ice bunker, substantially as and for the purposes set forth.

3. In a combined refrigerator and freezer, a suitable outside case, a refrigerating or freezing room and an ice bunker contained therein separated from each other by a partition formed by a series of angular sections placed one above the other and at some distance apart, forming inverted V-shaped ports leading from the refrigerating or freezing room into said ice bunker, the apex of one section being higher than the lower extremities of the section next above it, the bottom of said ice bunker being perforated and in communication with the refrigerating or freezing room, substantially as and for the purposes set forth.

The court in said case of Seegar Refrigerator Co. vs. American Car & Foundry Co. thoroughly analyzed the law bearing on the question of accounting, and although the contract under which the defendant worked stipulated the use therein of the infringing device, the court nevertheless held that the complainant was required under the law to segregate the profit realized by reason of the infringing device from that realized from the whole of the apparatus wherein the patented device was incorporated, stating:

"Where, in a suit for patent infringement, the case was one calling for an apportionment of

> profits, but complainant made no effort to prove the amount of profits reasonably attributable to the defendant, relying on the position that it was entitled to recover the entire profits made by the defendant from the sale of certain refrigerator cars containing the infringement, complainant could only recover nominal damages."

The device covered by the claims of the letters patent involved in said suit, and held to have been infringed, like the device of the claims held to have been infringed in the present case, related to only a specific portion of the whole installed apparatus.

This is the present case exactly. Claims 1 and 10 of the patent in suit and held to have been infringed comprise a grader consisting in combination of a plurality of independent transversely adjustable rotating rollers, a non-movable grooved guide, and a rope traveling in said grooved guide, rollers over which the rope travels, the rollers being so arranged relative to the non-movable grooved guide as to form a fruit runway, said rollers being independently rotatable and independently adjustable toward and from the non-movable grooved guide.

This is the invention held to have been infringed, and the grader placed on the market by the complainant herein, prior to the advent of defendant into the field. Since the issuance of Letters Patent No. 943799, Defendant's Exhibit No. 7, and prior to the infringing acts herein complained of, complainant Stebler elected to combine the two patented inventions in a single apparatus, (Answer to Q. 55, Record Page 95), but such an election does not entitle him to the profits derived from

the entire packing house machine or apparatus, nor relieve complainant from the necessity of producing proof segregating the profit realized by the infringement of the patented device from the profit realized on the whole of the installed machinery.

There is no testimony presented herein on behalf of the complainant even tending to demonstrate that the profits realized from the patented grader utilized in connection with the entire machinery were impossible of accurate and approximate apportionment. In fact, the testimony of complainant Stebler discloses that the patented grader in suit was at one time prior to the act of infringement manufactured and sold without the bins and distributing means, and, therefore, an accurate and approximate apportionment of the profits realized from the patented grader could have been proven by competent testimony and the records of his manufacturing business.

In Underwood Typewriter Co. vs. Fox Typewriter Co., 220 Fed., Page 881, the law as we have above set forth was followed by the Circuit Court of Appeals for the Sixth Circuit. The court cited from the Garretson case as follows:

> "When a patent is for an improvement, and not for an entire new machine or contrivance, the patentee must show in what particular his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of other parts, so that the benefit derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the

court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patentable feature.' "

The court further stating on page 885:

"The plaintiff did not comply with either of the rules stated in the latter portion of the quotation from the Garretson case. It produced no evidence to prove the profits between the improvements constituting the patented feature and the typewriter itself, as under the state of the evidence it should have done. * * * But the amount of such profits, and the damage, if any thereby occasioned, cannot be inferred without proof. Maier vs. Brown, 17 Fed. 736, 738; Seeger Refrig. Co. vs. American Car & Foundry Co. (D. C.) 212 Fed. 742, 748; Fay vs. Allen, 30 Fed. 446, 448."

In Westinghouse Electric & Mfg. Co. vs. Wagner Electric & Mfg. Co., 225 U. S. 605, the Supreme Court cites with approval the decisions heretofore given, stating:

"But if it be assumed, as was found to be done by the fact that the spaces were non-infringing and valuable improvements, it may then have prima facie appeared that these changes had contributed to the profits. If so, the burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of

> the commingled profits as was attributable to the use of its invention."

Again:

> "He must therefore give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural and speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."
>
> Garretson vs. Clark, supra.

The appellee Stebler made no efforts to comply with the law controlling accountings. He produced no testimony tending to separate the profits derived from the patented invention of the Claims 1 and 10 of the Re-issue Letters Patent No. 12297 from the profits derived from the patented distributing apparatus of United States Letters Patent No. 943799 and admitted by him to have been embodied in each and every installation made by him of the patented grader since the commencement of the suit for the infringement herein complained of. In fact, appellee Stebler testified (Record Page 96) in answer to Q. 55, page 95, that the grader would be no good without the distributing system and bins. In other words, according to his own testimony, it was the invention of Letters Patent No. 943799 on which he depended for his sales, and it would there-

fore seem that the profit in the main was derived from the use of the invention of the said Letters Patent No. 943799, Defendant's Exhibit No. 7.

Certainly, the testimony produced by appellee Stebler shows no effort to have been made to determine either the cost price of the patented grader or sizer or the profits derived therefrom. He states in reply to question 33 (Record Page 92) that the distributing system of his apparatus is covered by a separate patent from the patent in suit; and in reply to question 34 (Record Page 92) he states that his books will not disclose the exact cost of installations referred to in the various packing houses wherein he stated that his patented grader had been installed in conjunction with the distributing system of Letters Patent No. 943799. In reply to question 36 (Record Page 92) he states he kept no record as to costs. In reply to question 43 (Record Page 93) he states that he has kept no account of any one house. In reply to question 44 (Record Page 93) he states that he kept no detailed cost account. In reply to question 45 (Record Page 93) he states that the only effort he made to arrive at the cost of the patented graders was by putting the material through the shop and following it for the purpose of making the statement of cost presented on accounting.

We submit that this is not a compliance with the requirements of the law in determining the cost of a patented structure to the complainant, and if the cost of the structure is unknown it is impossible to determine the profits which he would have made

had he sold the device distinct from the invention covered by Letters Patent No. 943799. In reply to question 55 (Record Page 95) he states that he has never sold the patented grader or sizer subsequent to the infringement complained of without the invention of Letters Patent No. 943799 being incorporated therewith. He does state, however, in reply to question 57 that the established selling price for the patented grader prior to the act of infringement in 1910 complained of was $175.00, but no testimony has been produced to show even what the cost price of the patented grader or sizer was when he sold the same for $175.00, or at a date prior to the act of infringement herein complained of, and which act complained of was prior to the 24th day of May, 1910.

We submit that the Master had no evidence produced before him on which to determine what the profit of appellee Stebler was for the patented grader as separated from the profit derived by him on the invention of Letters Patent No. 943799, and as no attempt was made by the appellee Stebler to segregate the profit of the patented grader from the profit of the patented distributing system not involved herein, the Master could not, from the evidence, determine what such profit was, and he was not justified in accepting an arbitrary statement of appellee Stebler compiled in 1914 for the purpose of the accounting as to the cost of manufacturing the patented grader and deducting such estimated and uncertain cost from a selling price for which the patented grader sold for prior to May, in 1910

and prior to the commencement of the suit for infringement; and more especially so when the cost price given in the year of the accounting, 1914, was entirely speculative, appellee Stebler having testified that he kept no record of cost, but merely estimated the same. Such testimony as was produced by appellee Stebler on the accounting has not that certainty which the law requires in determining the profit or the difference between the cost price and the selling price of a patented article; and where he has made no effort to segregate the profits of the patented structure from the profits of the unpatented structure he is only entitled to an award of nominal damages.

The law in this respect seems to be definitely determined, not only by the decisions to which we have directed attention, but also in the late decision of the United States Supreme Court in the case of Dowagiac Mfg. Co. vs. Minnesota Moline Plow Co., et al.; Dowagiac Mfg. Co. vs. Smith & Zimmer, decided Jan. 11, 1915, and reported in 235 U. S., Page 641. In this case in its decision the court states:

> "That the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence where the profits from the sale of the infringing drills could be apportioned between the patented improvements and the unpatented parts."

And cites with approval the law as expressed in Westinghouse Co. vs. Wagner Co., 225 U. S. 604.

> "In so far as the profits from the infringing sales were attributable to the patented improve-

ments they belonged to the plaintiff, and in so far as they were due to other parts or feature they belonged to the defendants; but as the drills were sold in complete and operative form the profits resulting from the several parts were necessarily commingled. It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it, for, as was said in Westinghouse Company vs. Wagner Company, supra,

> 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.'

"In the nature of things, the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff, and therefore it was required to take the initiative in presenting evidence looking to an apportionment. Referring to a like situation, it was said in the case just cited:

> 'The burden of apportionment was then logically with plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention.' "

Appellee Stebler did not comply with the burden thus placed on him. According to his own testimony the two inventions, that is, the invention of Claims 1 and 10 of the Strain Reissue Letters Patent No. 12297 and the invention of the Stebler Letters Patent No. 943799, were commingled, and it was therefore his duty under the law as expressed by the Supreme Court in the case Dowagiac Mfg. Co. vs. Minnesota Moline Plow Co., supra, to have separated the profits realized from the invention of the

patent in suit, from the profits derived from the invention of Letters Patent No. 943799.

This was knowledge peculiarly within the complainant and the segregation of such profits could have been made had he so desired. Not having done so, he is only entitled to nominal damages, for, certainly, proof that in 1910 and prior to the infringement complained of he had sold the patented grader or sizer separately for the sum of $175.00 is no proof that he could have sold the same for $175.00 in 1914, during the accounting period, when the said patented sizer or grader ever since May, 1910 had been sold by appellee Stebler conjointly with the invention of Letters Patent No. 943799.

We submit that our second assignment of errors is well taken.

Our first, sixth and seventh assignments of errors may be considered together, inasmuch as they relate to error of the lower court in sustaining the Master's report holding the new apparatus placed on the market by appellant Parker to be an infringement of the sizer or grader covered by Reissue Letters Patent No. 12297.

This apparatus referred to during the course of the accounting as the Parker modified sizer is a device or apparatus differing from the apparatus of the Reissue Letters Patent No. 12297 to the same extent as the said invention of Claims 1 and 10 of the said Reissue Letters Patent differed from the devices of the prior art. It is a new machine

and one working on a different principle of operation from that of the invention of the said Reissue Letters Patent No. 12297.

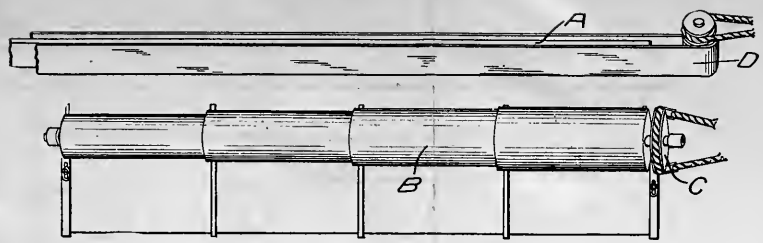
We do not contend that a Master on an accounting may not hold in a proper case that a device differing slightly from the infringing article is an infringement of the sustained patent, but we do maintain that where there is a substantial dispute and where the differences are such as to create a new machine, one constructed of elements working on a different principle of operation from the patented device, that in such a case the Master should not undertake to determine the question of infringement. We know that on a motion for a preliminary injunction, the court will not undertake to decide new issues.

In the case of Thompson-Houston Elec. Co., et al., vs. Exeter, H. & A. St. Rwy. Co., 110 Fed., p. 986, 987, the court stated:

> "The court cannot be required, on a motion for a preliminary injunction, to decide issues involving new and disputed theories respecting complainant's patent, and, where it is necessary to sustain the rights to an injunction, to go beyond a prior adjudication and give such patents an enlarged construction."

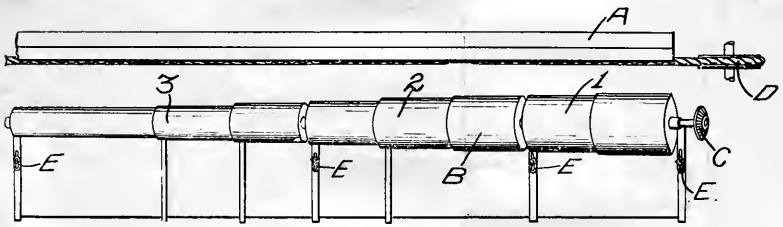
In the present case it was necessary for the Master to, and he did go beyond the scope and meaning of the prior adjudication of the Strain Reissue Letters Patent No. 12297; and he gave to such patent an enlarged construction, and he had to do so in order to hold the new machine, placed on the market by

Fig. 1.



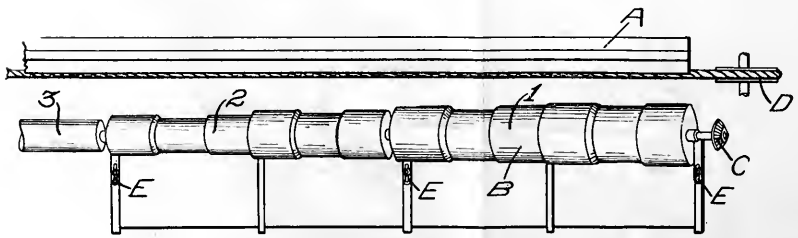
"Ish" Pat. No 458422. Aug. 20. 1891.

Fig. 2.



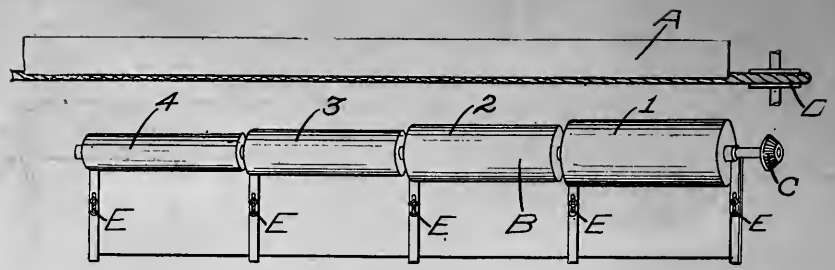
California Sizer Prior to 1900.

Fig. 3.



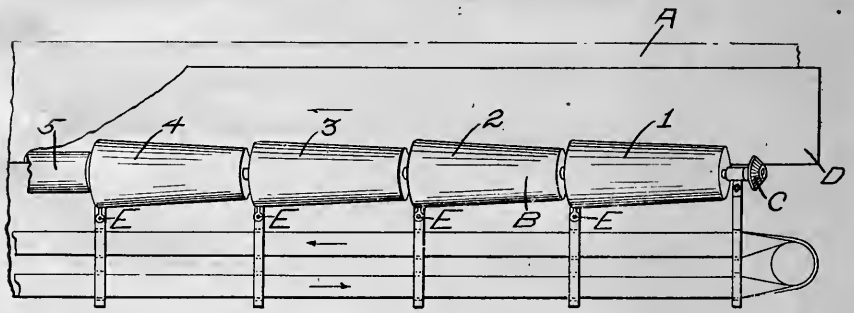
California Sizer, "Jameson" Prior to 1900.

Fig. 4.



California Sizer "Rialto".
Def. Ex. 3.4.5.

Fig. 5.



"Parker" California Sizer.

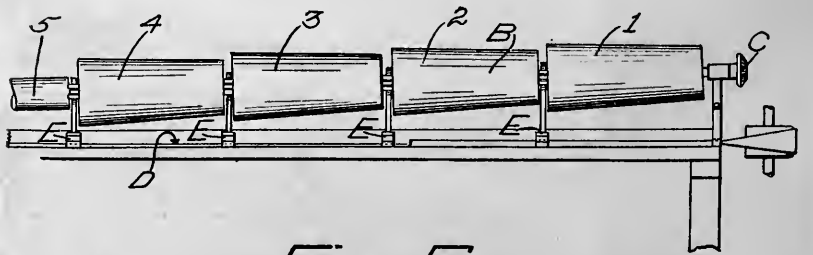
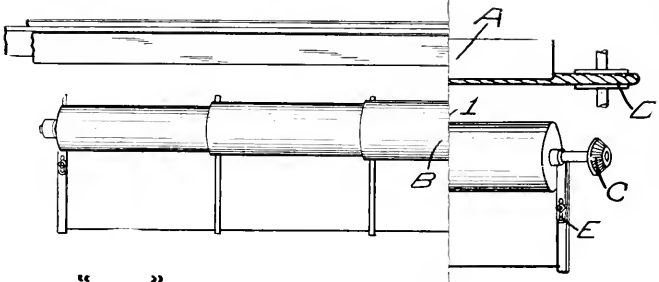


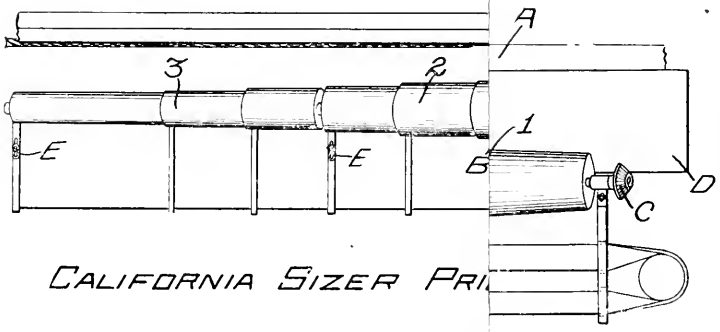
Fig. 6.

Fig. 1.



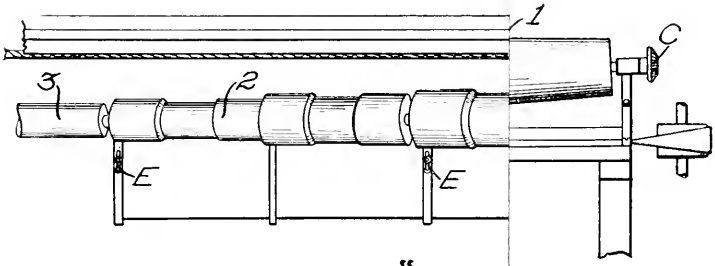
"Ish" Pat. No 458422.

Fig. 2.



California Sizer Pri

Fig. 3.



California Sizer, "Jame

appellant Parker since the rendition of the decision of this court in the case of Stebler vs. Riverside Heights Orange Growers Association, 205 Fed. 735 to be an infringement of Claims 1 and 10 of the Strain Reissue letters patent.

The proper course for appellee Stebler to have pursued was to file a supplemental bill and thereby give appellant Parker an opportunity to set up his defenses to the charge of infringement. Where, after an interlocutory decree adjudging the validity of a patent and enjoining its infringement, and the defendant thereto commences the manufacture and sale of a new device, which device is claimed to be an infringement, the correct practice is for a complainant to move for a supplemental decree.

> Sundh. Elec. Co. vs. Gen. Elec Co., 217 Fed. 583.

For an understanding of the construction and operation of appellant's new machine and the relation thereof to the machines of the prior art, we present herewith illustrations of the different types of machines constructed for operation in a manner differing from that of the invention of the Reissue Letters Patent No. 12297 and arranged for operation in the manner of the graders or sizers of the prior art, and all of which were before this court on the appeal of Stebler vs. Riverside Heights Orange Growers Assn., et al., and considered by this court, and the invention of the Reissue Letters Patent No. 12297 differentiated therefrom.

Cut No. 1 discloses the grading or sizing apparatus

of the Ish patent No. 458422 referred to by this court in its decision reversing the decision of his Honor Olin Wellborn and reported in the 205 Fed. 735. The Ish device is a fruit grader or sizer having a fruit runway composed of two parallel members, the member A being a fixed or non-movable member, and the opposing member B being a rotating member composed of a single roll of stepped form, there being as many steps to the roll as there are apertures for the graded or sized fruit, said roll being driven from power applied to one end of the shaft C, the fruit to be sized being propelled through the runway by endless carrying belt, D.

The testimony in the main suit disclosed that this device had been in use for a great many years prior to the date of the invention of the Strain Reissue Letters Patent, and is in use at the present time. The Ish Patent No. 458422 covering this invention was controlled by the appellee Stebler.

Following the Ish patent, and long prior to the year 1900, as disclosed by the testimony in the main case, there came on the market a fruit sizer known as the California sizer, which is illustrated by Fig. 2 of the sheet of drawings. Like the Ish device, the California sizer had a fruit runway composed of two parallel member A and B, A being the fixed member of the runway and B the rotary wall member thereof, and the fruit was conveyed through the fruit runway by means of the endless traveling carrier D. The rotary wall member of the California sizer differed from the rotary wall member of the

Ish device to the extent that the same was composed of a series of end to end roller sections, illustrated in the drawings by the numerals 1, 2, 3 and 4. These sections were connected one to the other and arranged in longitudinal succession, so that power applied to the drive member C at one end of the rotary wall member imparted rotation in unison to the series of connected roller sections 1, 2, 3 and 4. The sizer is in use at this time.

The departure made by the California sizer from the Ish patent resided in separating the rotary wall member of the Ish patented device of 1891 into a plurality of roller sections, but each so connected as to be rotated in unison from a common source of power applied at one end. The roller sections were mounted in bearing brackets E, so that the roller sections could be adjusted toward and from the fixed member A of the fruit runway to vary the distance there between, so as to regulate the grade outlets of the apertures for different size fruit.

By Fig. 3 is illustrated a California sizer which was used in the Jameson packing house in the Southern District of California and which was manufactured and placed in use prior to the year 1899 and is in use at the present day. It only differed from the California sizer disclosed by Fig. 2 of the drawings in so far as it had a greater number of roller sections of slightly different shape from the roller section of the sizer of Cut 2. Each roller section was connected one to the other so as to be driven in unison from power applied to the drive

connection C at one end of the roller sections. It had, in common with the Ish patent, a fruit runway composed of two parallel members A and B, the member A being a non-movable member and the member B constituting the rotary wall member for the fruit runway and consisting of a series of end to end connected roller sections, the said sections being mounted in bearing brackets E for adjustment toward and from the fixed member of the fruit runway.

Following the California sizer used in the Jameson Fruit Packing House came a California sizer represented by Fig. 4 of the drawings. Like the California sizers disclosed by Figs. 2 and 3 of the drawings, it had a fruit runway composed of two parallel members A and B, the member B constituting the rotating wall member of the fruit runway and consisting of a series of end to end roller sections 1, 2, 3 and 4 united one to the other so that power applied to the member C at one end of one of the roller sections imparted uniform rotation to the entire series of connected roller sections, the fruit being propelled through the fruit runway by means of the endless carrier D. This device was installed and placed in operation in the packing house of the Rialto Association and, according to the testimony, was manufactured about the year 1904. The testimony shows that the said machine was licensed by the appellee Stebler under the Ish Patent No. 458422 which was granted Aug. 25th, 1891 and expired in 1908. After the expiration of the Ish Patent August 25, 1908, it would appear that any one

had the right to manufacture and place on the market a device built under and in accordance with the California grader illustrated by Fig. 4 of the drawings and, as we shall hereafter show, admitted to be a California grader.

After the entry of the interlocutory decree in the case of Stebler vs. Riverside Heights Orange Growers Assn. and George D. Parker, which followed the decision of this court in appeal case No. 2232; 205 Fed. 735, appellant Parker, for the purpose of supplying the packing houses with fruit sizing devices, examined the various types of sizers then on the market, and which were free and open to him for the manufacture thereof. His examination led him to the device known as the Rialto sizer illustrated by Fig. 4 of the drawings, and finding said device to have been licensed by the appellee Stebler herein under the Ish patent No. 458422 of August 25, 1901, and knowing that at said time the Ish patent was an expired patent and free to the public, he proceeded to place on the market a fruit sizer constructed in all essentials like the device of the Rialto grader. The new grader of the appellant, termed in this case the "Parker New Sizer" is represented by Figs. 5 and 6 of the drawings, which illustrate respectively a plan view and side elevation of the said device.

Comparing the illustration of this device with the device illustrated by Fig. 3 of the drawings to wit, the Jameson California Sizer, we find it has in common therewith a fruit runway consisting of two parallel members A and B, the member A constitut-

ing the fixed member of the runway, and the member B the rotating wall member thereof. Like the said California sizer, which was used in the Jameson packing house, the rotating wall member of the Parker new sizer consists of a series of longitudinally disposed aligned roller sections 1, 2, 3 and 4, which roller sections are connected one to the other so as to be driven in unison from power applied to the drive member C secured to one end of the forward roller section of the series of connected sections. The fruit to be sized is propelled through the fruit runway of the sizer by means of the endless carrier D. This device, therefore, so far as relates to function and mode of operation, is the same as the Jameson California sizer represented by Fig. 3 of the drawing; and, like said device, the roller sections are moved toward and from the fixed member of the runway by means of the adjustable bearing brackets E; and, like the Jameson device, the said brackets support the ends of two adjacent rollers. It differs only slightly from the Jameson device to the extent that the roller sections 1, 2, 3 and 4 are made of tapering form, and to this extent it also differs from the roller sections 1, 2, 3 and 4 of the Rialto grader, Fig. 4 of the drawings, in which grader the roller sections are made of different diameters. In all respects, so far as operation due to the sizing of fruit and function of the working parts is concerned, the said Parker new sizer corresponds with and conforms to the California sizer installed and operated in the Rialto packing house and in the Jameson packing house, and to the California sizer

No. 12,297. REISSUED DEC. 27, 1904.

R. STRAIN.

FRUIT GRADER.

APPLICATION FILED OCT. 21, 1903.

Fig. 1

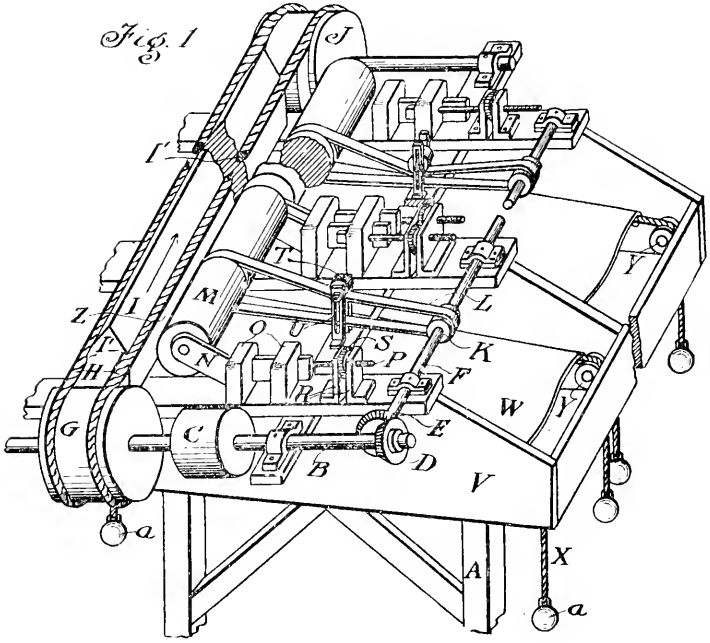
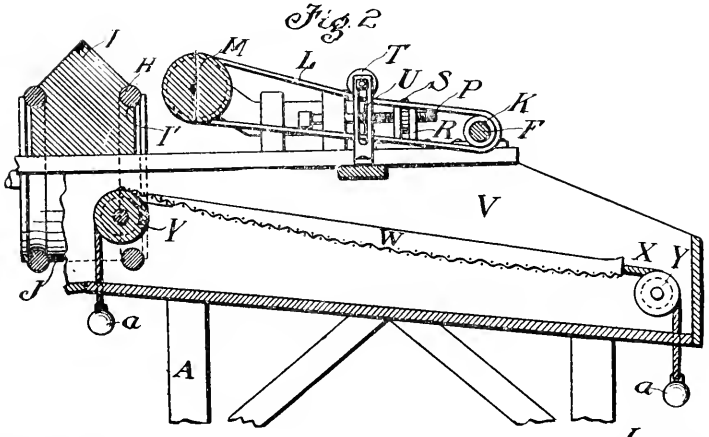


Fig. 2



Witnesses:

J. L. Mansfield

Frederick Shyon

Inventor:

Robert Strain

by Townsend Bros

Attys.

represented by Fig. 2 of the drawings. We therefore state, without hesitation, that the Parker new sizer is a California sizer of the prior art, and therefore, it follows that the Parker new sizer placed on the market by the appellant Parker since the rendition of the interlocutory decree in this case, is not and cannot be held to be an infringement of the sized of the Strain Reissue Letters patent. We furthermore state, that inasmuch as the letters patent of Ish, under which the Rialto sizer was licensed, had expired long prior to the manufacture and sale of the Parker new sizer, the appellant Parker was free to construct the same.

For the convenience of the court we herewith reproduce the drawings of the Strain Reissue Letters Patent No. 12297, for a comparison of the construction and operation of the said device with the construction and operation of appellant's new sizer.

It will be noted by reference to the said drawings of the Reissue Letters Patent No. 12297, and which appears on Record Page 65, *re* appeal case No. 2232, that the device thereof is a fruit sizer composed of two parallel members. The fixed member of the grader being designated by the reference letter I. Each member is grooved for the reception of a propelling rope H. The opposing member of the fruit grader consists of a series of end to end rollers M arranged in longitudinal succession the entire length of the grader, each roller M being rotatively mounted in adjustable bearing arms M, which arms have movement in the guide blocks O, and each of the rollers M is driven or rotated independently of

the other rollers by means of a drive belt L, which receives its motion from a drive shaft F. Each roller is independently adjustable transversely toward and from the fixed guide member I through the medium of the adjustability permitted the adjusting arms N which work in the guide blocks O. Under this construction each and every roller is permitted individual adjustment and this independent of the other grade rollers of the series of longitudinally disposed end to end rollers which constitute the rotating wall member or the companion member to the fixed parallel member I of the fruit runway.

Under the disclosure of the Strain Reissue Letters Patent it is absolutely essential that each roller of the series of disconnected rollers constituting the rotary wall member of the fruit runway be permitted *independent* and *individual* rotation. If the rollers were connected one to the other so as to be driven in unison, it would be impossible to impart *independent transverse adjustment* to one roller without correspondingly disturbing the position of the adjacent roller. It is the *independent* and *individual adjustability* and the *independent* and *individual rotation* of the respective rollers constituting the rotating wall member of the fruit grader of the Strain Reissue Patent which differentiates it, or rather which caused this court to differentiate the same from the patented Ish and the California fruit graders or sizers of the prior art.

In appeal case No. 2232, the fruit sizer involved therein, and which was held by this court to be an infringement of the Strain Reissue Letters Patent,

comprised a series of *independent* and *individual* sizing rollers, each *independently* and *individually* rotatable and *independently* and *individually* adjustable toward and from the fixed member of the fruit runway, and they were adjustable and rotatable in a manner corresponding to the *independent* and *individual* adjustability and the *independent* and *individual* rotation of the grade rollers of the Strain Reissue Letters Patent.

The decision of this court in the main case, appeal case No. 2232; 205 Fed. 735, differentiated the invention of the Strain Reissue Letters Patent from the California fruit sizers or graders of the prior art in the same manner and to the same extent as the appellant's new grader differentiates from the sizer or grader of the Strain Reissue Letters Patent.

The only distinction between the California sizer or grader and the sizer or grader of the Strain Reissue Letters Patent lay in the California grader having the roller sections arranged in longitudinal succession and united one to the other so as to be driven in unison from power applied to one end, the roller sections being mounted in bearing brackets in such a manner that the ends of adjacent rollers were moved thereby on adjustment being given to the bearing brackets; in other words, the roller sections were not *independently* and *individually* adjustable toward and from the fixed member of the runway, nor were they *independently* and *individually* rotatable; whereas, in the device of the Strain Reissue Letters Patent each roller was mounted in inde-

pendent bearing brackets so that each roller could be *independently* and *individually* adjusted toward and from the fixed member of the fruit runway and each roller *independently* and *individually* rotatable.

It was our contention throughout the hearing before his Honor Olin Wellborn, and equally so before this court in appeal case No. 2232, that the California sizer or grader disclosed a sizer having a fixed member and an opposing rotating wall member, the latter of which consisted of a series of end to end roller sections with means for adjusting the roller sections toward and from the fixed member of the fruit runway, and that, therefore, this construction of a fruit sizer or grader anticipated the fruit sizer or grader of the Strain Reissue Letters Patent in suit.

In opposition to our contention, appellee Stebler strenuously insisted that the California grader, consisting of a series of connected end to end roller sections, did not disclose a series of end to end rollers, which rollers were *independently* and *separately adjustable* transversely toward and from the fixed member of the fruit runway and *independently* and *individually* rotatable with respect to each other; in fact, witness Stebler, the owner of the Strain Reissue Letters Patent, insisted that the California grader did not disclose a series of end to end independently adjustable and independently rotatable rollers, but on the contrary, it disclosed merely a single roller extending the entire length of the machine and formed of a series of end to end connected roller sections, as evidenced by his answer to X, Q. 137,

appeal record case 2232, page 655, reading as follows:

"Although the rollers were constructed in sections they were coupled together in such a manner in the bearings that it constituted a continuous roller." Also in response to X, Q. 57, appeal record page 67, witness stated, referring to the California grader, "It was made in sections and the sections fastened together."

This distinction between the California grader and the grader of the Strain Re-issue Patent in suit was carried throughout the case, it being urged before this court, on appeal, that the invention of Mr. Strain resided in a series of disconnected rollers, each roller being *independently* and *transversely* adjustable and each *independently* rotatable, the said rollers being arranged end to end, each roller being mounted in separate bearings, and each roller being capable of an adjustment without disturbing or varying the position of an adjacent roller in any manner whatsoever. This court accepted the contention so made.

It is obvious that no such independent transverse adjustment can be given to the end to end rollers constituting the rotary wall members of the grader of the Strain Re-Issue Patent and called for by claims 1 and 10 thereof, unless the rollers are mounted absolutely independent of each other, and unless they are so mounted as to revolve independently of each other. If the rollers rotated in unison, that is, one roller connected to the other roller throughout the length of the fruit grader so

that the motion of rotation of one roller was transmitted to its adjacent roller, it would impossible to independently adjust one roller transversely toward and from the fixed member of the fruit grader, without disturbing the position of its adjacent roller connected thereto.

Appellee's counsel urged before this court on appeal that the distinction which we have above referred to differentiating the fruit grader of the Strain Re-Issue Patent from the California grader of the prior art. Counsel stated in his opening brief on appeal, page 11, the following:

> "The distinct feature of Mr. Strain's invention was the principle of using to form the grading opening, *an independently mounted roller for each sizing or discharge opening and mounting each roller so as to be independently adjustable to and from the longitudinally moving belt.*"

Again on page 15:

> "It is not claimed that there was any novelty *per se* in any one of the mechanical devices utilized by Mr. Strain. His invention resided broadly in the use of *individual rollers, each mounted independently adjustable toward and away from the carrier belt.* This was the inventive idea conceived and produced by Mr. Strain."

This court, in appeal case No. 2232, accepted the statements made by counsel for the appellee as distinguishing the grader of the Re-Issue Patent from the graders of the prior art, the court stating (205 Fed. 737) as follows:

> "In this state of the art Strain conceived the invention covered by the claims in suit. In effect

> it may be described as a modification or addition to the Ish machine, by cutting the roller into as many pieces as there are steps, and *separately* mounting them, all in line longitudinally, *each being independently and transversely adjustable.* More accurately, several short rollers of uniform diameter are arranged in line."

On page 738 the court states, referring to the Parker infringing grader and comparing the same with the grader of the Re-issue Patent in suit:

> "As in the Strain invention, the outer wall or side of the grade space or aperture is made up of a short *independent* roller rotating upward and outward to avoid pinching the oranges; also, like the Strain machine, this roller is mounted upon brackets of its own and is *transversely and independently adjustable* at the will of the operator."

On page 739 the court states:

> "The defendants have appropriated the plaintiff's invention, the essence of which is the combination with a travelling belt (common to the Ish, Strain and Parker machines) of a series of *independent rotating units* arranged in longitudinal succession parallel with the belt, *each transversely adjustable.*"

It will thus be seen that the appellant's device was held by this court to be an infringement of appellee's patent fruit grader by reason of the fact that each of the series of individual rollers constituting the rotating wall member of the fruit grader was *independently adjustable* transversely toward and from the fixed member of the runway and the end to end rollers were *independently rotat-*

able one with respect to the other, each of the adjustable and rotatable rollers being mounted in *independent* brackets of its own. Under this construction, any one roller or grade unit of the series of rollers arranged in longitudinal succession was adjustable transversely without disturbing the position of an adjacent roller, and adjusted in the same manner as the individual rollers of the grader of the Re-issue Patent.

To construe or hold the new grader manufactured and sold by the defendant Parker since the entry of the interlocutory decree in this case to be an infringement of the fruit grader of the Strain Re-issue Patent in suit, it is necessary to find in the said new grader the elements of the patented grader of the Re-issue Patent, and that such elements are arranged in the same manner as the corresponding elements are arranged for operation in the machine of the Re-issue patent; or in other words, we must find in the new machine a series of *disconnected* rollers or rotating sizing units, and these units must not only be *transversely* adjustable toward and from the fixed member of the grader runway, each of the said rollers must be *independently* and individually adjustable toward and from the said fixed member. Further, each roller must be mounted in *independent bearing brackets* and the arrangement of the said rollers or rotating sizing units is required to be such that one roller or grading unit may be rotated and shall rotate *independently* of each and every roller or grading unit of the series of rollers, arranged in longitudinal succession.

The Master described the appellant's new machine placed on the market since the rendition of interlocutory decree, as the Rialto California sizer, stating, commencing at the bottom of Record page 290:

> "The manner of separating and adjusting the roller side of the runway of said grader is not such as to permit in any manner of individual adjustment of separate grade openings formed by the roller surface and the belt, and in this respect the machine corresponds to the California grader referred to in the record in this case."

Appellant Parker testified that his new device is the same in operation as the California grader of the prior art; that is, his new grader consists of a fruit runway formed of a fixed guide member and belt for propelling the fruit through the grader runway, and a series of roller sections arranged in longitudinal succession and parallel to the fixed member of the runway, which sections the witness testified are connected one to the other to revolve in unison in exactly the same manner the connected roller sections of the California grader were and are connected. He further testified that these roller sections were not mounted in *independent bearings* brackets, as the individual rollers of the Strain patent are mounted, and that the roller sections are not *independently adjustable* transversely toward and from the fixed member of the fruit runway, as under said patent; but, on the contrary, as the series of roller sections are united or coupled one to the other to rotate in unison, it is impossible to adjust one roller section transversely without ad-

justing or varying the position of an adjacent roller section. Witness further testified that these roller sections, being united or connected one to the other, are all driven in unison from power applied to one of the end roller sections. He further testified that the roller sections were not mounted in *independent adjustable bearings.* According to the testimony of the witness Parker, the new fruit grader differs from the fruit grader of the Strain Re-issue Patent in the same manner and to the same extent as this court differentiated the fruit grader of the Strain Re-issue Patent from the California grader of the prior art.

If the testimony of complainant Stebler, and to which we have before referred, is correct; that is, that in the California grader of the prior art the rotating wall member thereof comprises a *single roller* consisting of a series of united roller sections, then such testimony applies with equal force to the new grader manufactured and placed on the market by appellant Parker, and upholds and supports the testimony of said appellant given in connection with the new machine, held by the Master to be an infringement. Appellant is thus upheld, not only by the testimony given by appellee Stebler in the main case, but he is supported in the present case by appellee's expert witness Knight, and by appellee Stebler, when giving affidavits in Equity Suit A-92, entitled Fred Stebler versus George D. Parker and Pasadena Orange Growers Association, commenced in the District Court, Southern District of California, Southern Division since this case was re-

ferred to the Master for an accounting and which said affidavits were considered by the Master as introduced into the present case under accounting.

When instituting said action No. A-92, appellee herein considered and treated the appellant's new machine as being a machine, the rotating wall member of which consisted of a *single roller* extending the full length of the grader, and so considered the rotating wall member of the appellant's new grader for the purpose of charging the same to be an infringement of United States Letters Patent No. 775015 granted Thomas Strain under date of November 15, 1904, for an improved fruit grader. These letters patent have been introduced in evidence as "Defendant's Exhibit 7," Record Page 261, and by reference thereto the court will observe that the rotating wall members of the fruit grader consisted of a single rotating rod extended the entire length of the grader and referred to in the letters patent by refernce numeral 20.

For the purpose of identifying defendant's new sizer or grader with the sizer or grader of the said Thomas Strain Patent No. 775015, appellee's expert witness Knight stated, in making his comparison between the appellant's new grader and the grader of the said Thomas Strain letters patent, as follows:

> "In both machines there is provided means for retaining the fruit on said belt, such means differing in defendant's machine from the particular type shown in the drawing of the said Strain patent only in size and material, but not in function or in mode of operation; such means in defendant's machine comprises a series of wooden

> rollers, *so mounted as to constitute a single roller for the length of the machine.*" (Page 4 of the affidavit.)

Appellee Stebler, in his affidavit given when applying for a preliminary injunction in said Equity Suit No. A-92, upholds the statement of expert witness Knight and, in addition thereto supports appellant Parker's testimony that the adjustment of one roller varies the position of an adjacent roller, stating as follows, relative to the supporting brackets for the roller sections of the Parker device, viz.:

> "The arrangement of these adjustable brackets, however, is such that adjusting a single bracket adjusts or moves the ends of two abutting rollers, as a single bracket carries the pintle of two adjoining or end to end rollers which in effect throws such adjoining rollers out of their natural and true alignment."

We thus have appellee's own expert witness Knight giving testimony that in the appellant Parker's new machine or sizer the rotating wall member thereof consists of a single roll, due to the fact that he considers the series of roller sections united one to the other to rotate in unison, as constituting a single roll. And we have appellee Stebler testifying that you cannot vary the adjustment of one of the bearing brackets for the roller sections of the continuous roller, without it adjusts or moves the ends of two abutting rollers, "which in effect strain such adjoining rollers out of their natural and true alignment." We must give full credence to such testimony, coming, as it does, from the appellee Stebler

and his expert witness Knight, and, giving full credit thereto, we find that the appellant's new machine differentiates from the device of the Strain Re-issue Patent in precisely the same manner in which the said patented machine was differentiated, not only by complainant's counsel, but equally so by this court, from the California grader of the prior art.

If this be true, and we respectfully submit that it is, the same differences which were urged to take the grader of the Strain Re-issue Patent from the prior art to save the same from anticipation, must apply with equal force to take the appellant's new machine from within the protection afforded by the Strain Re-issue Patent.

The affidavit of Thomas Strain, filed in Equity Suit A-92, in opposition to complainant's affidavit for a preliminary injunction, stated in connection with the appellant's new grader, as follows:

> "That the grade runway of the apparatus being installed by the said George D. Parker, and alleged herein to be an infringement of the claims specified in the bill of complaint of the two letters patent mentioned, has a grade runway *conforming in all respects with the grade runway of the old California fruit grader,* which mentioned California fruit grader has been on the market and in use in the packing houses within and throughout the Southern District of California for a period of more than ten years last past; the use of the said machine dating from at least the year 1898."

Mr. Thomas Strain, Jr., in his affidavit given on behalf of appellant in opposition to the affidavit

filed by complainant for use on preliminary injunction in Equity Suit A-92 states:

> "That the fruit grading apparatus being now installed by the said George D. Parker in the above mentioned packing house, conforms in all respects to the fruit grading apparatus known in this district as the California fruit grader or sizer, which California fruit sizer has been in use in the various packing houses in the Southern District of California ever since at least as early as the year 1898, and many of which are in use at the present time in the various packing houses."

Appellant Parker testified on the accounting that the new grader in use at the Riverside Heights Orange Growers Association is the same in all respects, so far as concerned the arrangement of the roller sections, as the machine which was being built by him for the Pasadena Orange Growers Association at the time the affidavits of Mr. Knight, Mr. Stebler, Mr. Thomas Strain and Mr. Thomas Strain, Jr., were given.

We contend that the Master could only have found the Parker new machine to be an infringement of the grader of the Strain Re-issue Patent by enlarging or expanding the decision rendered by this Court in case No. 2232, and on which decision the decree of the lower court is based; and we further submit that the Master was inconsistent in his description of the said Parker new machine.

In his report, record 287, the Master states, relative to the appellant's new machine which he had observed in operation at the packing house of the

Riverside Heights Orange Growers Association that the same comprised or consisted of:

> "A combination with a traveling belt (a canvas belt of about eight or nine inches in width, slightly raised in the center to force the oranges against the side wall of the machine, being used in these instances), upon which the oranges are dumped and carried forward on the belt, *with a series of independent rotating units of about 45 inches in length,* placed end to end and arranged in longitudinal succession parallel with the belt, each transversely adjustable."

If this is a correct statement of the defendant's new machine, it is at variance with the testimony of appellant Parker and with the affidavits before referred to of expert witness Knight, appellee Stebler, and of Thomas Strain and Thomas Strain Jr., and it is in conflict with his subsequent statement on same page, reading as follows:

> "The rolls constituting the rotating wall of the grader are connected one to the other for the purpose of rotation, and they are driven in unison from power positively applied at one end."

We thus have one statement or description of the alleged infringing machine as to the rotating wall member of the new machine consisting of a series of independent rotating units, coupled with the inconsistent statement that the rolls constituting the rotating wall of the grader are connected one to the other for rotation, and that they are driven in unison from power positively applied at one end.

If the roller sections of the rotating member are

connected so as to be driven in unison, they are united in the same manner as the roller sections of the old California grader were united, and if so united, they cannot constitute independent rotating units, for there can be no independence as to rotating units if the units are united to rotate in unison. Either the Master did not understand the construction and operation of the appellant's new grader, or he has given an inaccurate description of the same in his report. It is our duty to take the conflicting statements and assume that one to be correct which is reconcilable with the testimony given, which is that the roller sections are not independent rollers, but roller sections connected one to the other for rotation in unison, and that, being non-independent roller sections, they are not independently adjustable and not independently rotatable, and which testimony conforms with the Master's statement that the roller sections are driven in unison.

If the new machine being manufactured and sold by appellant has not power applied for rotating each roller section independent of the other roller sections, nor are the sections independently rotatable, it cannot be said to have individually rotating and independently adjustable roller sections. However, the Master assumed for the purpose of making out a case of infringement that it was immaterial whether the roller sections are connected one to the other and are driven in unison by power positively applied at one end of the series, or whether the rollers are independent of each other individually and independently driven, stating in this connection as follows:

> "The modified device is a series of end to end rollers all so connected that they are positively driven from the roller at the head end of the machine, while in the Strain Re-issue Patent each roller is driven by a separate belt from a common shaft. The function in regard to the rotation of the rollers is the same in each case since they all rotate together in either case. Practically, inasmuch as these rollers are all so connected that they rotate together they constitute a single roller."

The Master in thus enlarging the decision of this Court rendered in appeal case No. 2232, has given a construction to the patented machine never contemplated by this Court, and in opposition to appellant Stebler's testimony that the grader of the Strain Re-issue Patent differed from the California grader of the prior art in the fact that the California grader consisted of a single roller composed of a series of end to end roller sections, connected one to the other for rotation in unison; whereas, the roller member of the machine of the Strain Re-issue Patent consisted of a *series of independent rollers.* The only real distinction between the California grader and the grader of the Strain Re-issue Patent resided in the fact that the transversely adjustable rollers of the Strain device were not connected one to the other for rotation in unison, while in the California sizer they were so connected. This Court accepted the distinction so made *and it is not now within the power of the Master to find that the very distinction created by the Circuit Court of Appeals between the fruit grader of the Strain Patent and the California grader of the prior art, is an imma-*

terial distinction. It was the duty of the Master to accept the decision of this Court as he found it, and not endeavor to construe the decision to meet a different state of facts and give unto the complainant herein the machine of the prior art.

Seemingly, the Master was seeking for the function performed by the respective machines, but it is obvious that the function of each of the machines is to grade or size fruit, and such was the function of all of the fruit graders of the prior art. It is not a question whether the result of the operation is the same in each case, but such, apparently, was what the Master had in mind, and having found the result the same, that is, the sizing of fruit, held the new machine to be an infringement. In this he was wrong, for infringement is not made out by comparing the functions of machines, unless the same elements and arrangement of working parts are carried out.

> "If the combination of a defendant shows a mode of operation substantially different from that of the complainant, infringement is avoided even though the result of the operation of each is the same."

Brammer vs. Witte, 159 Fed. 726.
Brooks vs. Fiske, 15 How. 211.
Union vs. Battle Creek, 104 Fed. 337.
Cimiotti vs. American, 198 U. S. 399.

In the present case there has been introduced before the Master on behalf of defendant a photographic exhibit of the California grader installed

and in use in the Rialto Packing House, Defendant's Exhibit 3, 4, 5, Record pages 254, 255, 256, which disclose a fruit grader, the rotating wall member of which consists of a sectional roller extended the entire length of the machine, and said roller member comprises a series of roller sections arranged end to end and mounted in adjustable bearings. These bearings support the ends of two adjacent roller sections and the construction and operation of the same is such that if transverse adjustment is given to one roller section to move the same toward and from the opposing fixed member of the fruit runway, it moves therewith the adjacent roller section. The construction and operation of this California grader is the same as that of the Parker new grader and the said Rialto grader is correctly described by the Master, Record page 290, wherein the Master held the Parker new machine to be similar in construction and operation to the said California grader in the Rialto Packing House.

As before stated, this California grader, according to the evidence, was licensed by the complainant herein under the Ish patent, owned and controlled by complainant Stebler, likewise owner at such time of the Strain Re-issue letters patent, and said grant of license unquestionably established that at the time of its grant the complainant herein considered said machine to be one of the California graders of the prior art. It does not differ from any of the California graders of the prior art except that there is a roller section for each grade of fruit to be sized. However, the arrangement of the roller sections and

the connection of one to the other and the manner of supporting the roller sections in the adjustable bearing brackets is identical in all respects with the corresponding arrangement of the roller sections of the well-known California sizer, and this Rialto machine differs from the grader of the Strain Patent in suit in the same manner as appellee Stebler differentiated the machine of the Strain Re-issue Patent from the California grader; that is, the said Rialto California grader consists, so far as relates to its rotating wall member, of a single roller extended the full length of the machine, said roller comprising a series of roller sections united one to the other so as to be driven in unison from power positively applied at one end, neither of the roller sections being *independently* and *transversely adjustable* and *independently rotatable* with respect to the other roller sections; that is to say, one roller section of the rotating wall member cannot be adjusted or moved toward and from the fixed member of the runway without disturbing the position of an adjacent roller section, and this distinction applies with equal force between the new grader manufactured and sold by the defendant Parker and the grader of the Strain Re-issue Patent.

Complainant's expert witness Knight had no difficulty in identifying the Rialto California grader as a California grader of the prior art for, in testifying on this subject, Record page 126:

> "Q. 31. Were not the rollers of the grader about which you gave the affidavit, and are not the rollers of the new grader which you examined today (Rialto Grader) connected one to the

other in substantially the same manner as the rollers of the Ish patent, or what is known as the California sizer, were connected? You understand in my last question what is meant by the Ish, Mr. Knight?

"A. Yes.

"Q. 32. I will ask you to answer the question with that understanding of the Ish patent.

"MR. ACKER: I mean by the 'California grader' that grader which was referred to in the testimony in the suit to which the present accounting is being directed and as to which you testified in said suit.

"A. In the Ish grader shown in the original patent there was really only one roller provided with a series of steps, but in the California grader there is, for example, at the Rialto Packing House—there are several rollers which are end to end and which are connected to rotate together. In so far as this connection to rotate together is concerned, the construction of this California grader is similar to that of the two types of machine at the Riverside Heights Packing House."

The witness was not asked concerning the Rialto grader but as to the California graders known to him at the time he gave his testimony in the main suit, and in answer to the same and for the purpose of explaining his knowledge of the California grader, he identified the Rialto grader as a California grader of the prior art. The witness's testimony accords with the balance of the testimony in the present case, that the Rialto grader is the same as the California grader of the prior art, and it was so recognized by complainant Stebler when granting a license for the use of the same under the Ish patent of 1891.

The Master in the present case made no effort to determine whether or not the Parker new grader fell within the terms of claims one and ten of the Strain Re-issue Patent, but simply based the question of infringement on an interpretation placed by him on the decision of this Court in appeal case No. 2232, and which interpretation we respectfully submit is erroneous.

In appellant Parker's new grader we do not find a device conforming to inventions of the combination claims 1 and 10 of the Strain Re-issue letters patent.

Claim one calls for a plurality of independent transversely adjustable rotating rollers. According to the Master's own report the Parker new grader does not have in its combination a *plurality of independently transversely adjustable rotating rollers,* for the connection between the roller sections is such that one section cannot, according to his own statement, be adjusted without adjusting an adjacent roller.

Again, there is no movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of the rollers, due to the fact that the roller sections are tapering in front and therefore no plane which passes through the center of the said roller sections could lie parallel with the non-movable grooved guide.

Again, the roller sections of the series of connected roller sections are not *independently rotatable,* inasmuch as they rotate in unison. A fruit grader conforming to the description, given by the

Master, of the Parker new machine would not conform to Claim Ten of the Re-issue Patent, as it would not have a runway composed of two parallel members, one of the said members consisting of a *series of end to end rolls, brackets carrying the rolls, and guides for the brackets,* inasmuch as the said device does not disclose end to end rolls with brackets carrying the rolls in the same sense as they have been construed by this Court to be *independent adjustable rollers* with *independent brackets* for each roller of the Strain Re-issue Patent.

The Master, throughout his decision, completely ignored the construction given to said claims One and Ten of the Strain Re-issue Patent by this Court and equally so the interpretation placed thereon by appellee Stebler to differentiate the same from the California graders of the prior art.

In the present case this court held the Strain Re-issue Patent not to be a pioneer invention; therefore, the patent claims are not to be given that liberality which attaches to a basic invention.

> "The case is one where in view of the state of the art the invention must be restricted to the forms shown and described by the patentee. He was not a pioneer; he merely devised a new form to accomplish these results."
>
> Duff vs. Sterling, 107 U. S.
>
> "Where the state of the art shows prior devices limiting the scope of the invention, the claim must be strictly construed."
>
> Newton vs. Furst, 119 U. S. 373.

From a careful reading of the Master's descrip-

tion of the Parker new grader, it is evident that the said grader does not contain grading rollers which are *separately mounted;* neither does it contain *rollers arranged in longitudinal succession,* "each being independent of the other and each transversely adjustable"; neither does the said description portray a machine containing *independent grading rollers each independently adjustable* and each "*mounted upon brackets of its own.*" For, according to the Master's own description, the roller sections are not *independently mounted;* they are not independently rotated; they are not *independently adjustable* with respect to each other; nor are they mounted upon *brackets of their own.* The said machine thus fails to embody the very elements which differentiate the device of the Strain Re-issue Patent from the devices of the prior art; in short, appellant Parker's new machine is a step backward in the art, and since the entry of the interlocutory decree in this case he has proceeded to manufacture and place on the market the *California grader* pure and simple, which machine is generically the said California grader of the prior art.

The Rialto grader is the California grader of the prior art, as is readily determined by comparison with the Jameson California grader. It is the California grader, according to the testimony of appellant Parker, and even without the testimony of Mr. Parker, it is the California grader under the testimony of appellee's expert witness Knight, and under the affidavits of said witness Knight, the appellee Stebler, Thomas Strain and Thomas Strain,

Jr., as set forth in the affidavits in the case of Equity Suit No. A-92.

We respectfully submit that our assignment of errors 1, 6 and 7 are well taken.

Our 5th assignment of errors is directed against the allowance to appellee Stebler of the sum of $2340.20 in addition to the sum found by the Special Master to be due unto the appellee as combined damages and profits.

It is only in that class of cases wherein the defendant has wilfully and deliberately violated the injunctive order of a court, that the court will inflict a penalty for the act complained of, if found to be a violation of the injunctive order.

We submit that in the present case no testimony contained in this record, nor any act disclosed on the part of appellant Parker can justify a finding that the said appellant Parker deliberately or wilfully disobeyed or disregarded the injunctive order of the lower court. On the contrary, the proofs disclose that the said appellant Parker was endeavoring to avoid the doing of any act which could be construed to be a violation of the injunctive order. He discontinued the manufacture and sale of the infringing machine and proceeded to place on the market an apparatus of that form and construction which fell within the well known California sizer of the prior art. In his search for a form of sizer open to him to place on the market, his attention was directed to the Rialto sizer, which sizer, as we have before pointed out, was licensed by the appellee Stebler under the Ish Patent No. 458422 and licensed

by him at a time when he was the owner also of the Strain Reissue Letters Patent. Feeling sure, by reason of the expiration of the Ish patent, and under advice of counsel, that the Rialto constructed device was not a violation of any rights then existing to appellee Stebler, he proceeded to manufacture and place the same on the market. Inasmuch as appellee Stebler by the granting of his license to the Rialto packing house gave information to the public at large that the same fell within the protection of the Ish patent, and no other patent owned or controlled by him at the time of the issuance of the license (although then the owner of the Strain Reissue Letters Patent), he cannot, with good grace, complain at this time that one member of the public elected to continue the manufacture and sale of the said Rialto sizer, after the expiration of the said Ish Letters Patent No. 458422, which expired August 25, 1908.

As before pointed out, counsel for appellee Stebler did not consider or treat the Parker new device as being an infringement of the Strain Reissue Letters Patent, for the record discloses that suit was instituted against the said Parker and the Pasadena Orange Growers Association for infringement of the Thomas Strain Letters Patent No. 775015, patented November 15, 1904, defendant's Exhibit No. 6, and wherein the rotating wall member for the fruit runway is disclosed as a continuous rod or shaft extended from one end of the machine to the other. In order to bring the appellant's new sizer or grader within the terms of the said Strain Patent No. 775014, appellee

Stebler and his expert witness Knight gave affidavits for use on preliminary injunction contending that in the Parker new sizer the rotary wall member comprised a *single roll* extending from one end of the machine to the other, in contra-distinction to the rotary wall member of the Strain Reissue Letters Patent consisting of a series of *independently* and *individually* adjustable and *independently* and *individually* rotatable rolls.

We respectfully submit that there was no justification in this case for the lower court to increase by the sum of $2340.20 the amount found due by the Master unto the appellee as combined damages and profits, by reason of the manufacture of the new sizing apparatus.

We submit that it is a plain case of abuse of discretion. Penalizing an infringer by increasing the damages is seldom resorted to. It surely should not be done, where in a case like this the alleged continued infringement is open to such serious debate, that, in reality, the question should have been determined by a new suit, or by a supplemental bill, or, at least, by contempt proceedings, and not decided by the Master on an accounting, wherein but limited opportunity is given for the introduction of the proof required to establish the fact. Under such circumstances, we submit, the Court below was not warranted in accepting the conclusion of the Master upon the new alleged infringement, with such freedom from all doubt, as would justify the imposition of the penalty.

We submit that our assignment of error No. 5 is well taken and should be allowed.

In support of our assignment of errors directed to the lower court in sustaining and approving the Master's report in its entirety, we respectfully submit that if any of our other assignments of error is well taken, then this assignment of error should be allowed.

Respectfully submitted,

N. A. ACKER,

Solicitor and Counsel for Appellants.

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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Fred Stebler, *Complainant-Appellant,* *vs.* Riverside Heights Orange Growers Association and George D. Parker, *Defendants-Appellees.*	No. 2772. On Complainant's Cross-Appeal From Final Decree.

Complainant's Opening Brief on Cross-Appeal.

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Fred Stebler, *Complainant-Appellant,* *vs.* **Riverside Heights Orange Growers Association and George D. Parker,** *Defendants Appellees.*	**No. 2772. On Complainant's Cross-Appeal From Final Decree.**

Complainant's Opening Brief on Cross-Appeal.

This is a cross-appeal taken by complainant from the final decree entered by the District Court October 30, 1915, after a hearing upon both complainant's and defendants' exceptions to the report of the Special Master.

Complainant's bill of complaint was filed May 24th, 1910, and alleged an infringement of claims 1 and 10 of reissue letters patent No. 12297, dated December 27, 1904, for fruit graders.

From a decree dismissing the bill of complaint on the ground that the patent in suit was not infringed by the defendants, complainant appealed and this court reversed said decree and ordered an interlocutory decree granting the injunction prayed for and referred the cause to a Special Master to take and state an account of the profits derived by defendants from the infringements and to assess the damages suffered by complainant.

205 Fed. 735.

Defendants filed a petition for *certiorari* in the Supreme Court of the United States seeking a review of this order of this court. This was denied.

After the entry of the interlocutory decree defendants moved the trial court to enjoin the prosecution of certain suits brought by complainant for injunctions against users of infringing machines purchased from defendant Parker. The lower court granted such motion upon defendants executing bond to cover all profits and damages. From the allowance of such injunction complainant appealed to this court. This court modified such injunction and confirmed it. In so doing this court construed the interlocutory decree in this case, and the construction placed upon such decree became the rule of law in this case.

214 Fed. 550.

After the decision of this court in 214 Fed. 550 the accounting was taken before the Special Master who filed his report [Transcript pp. 284-328] finding that complainant should recover from the defendant Parker the sum of $5,232.85 as the profits and gains made by

defendant George Parker from the manufacture and sale of machines infringing the patent in suit; that complainant should have and recover from the defendant George D. Parker the sum of $6,237.35 damages; that the complainant recover jointly from the defendants the sum of $585.05 damages, this joint judgment being included in the damages awarded against the defendant Parker individually.

On the accounting it was shown that the defendant Parker had made and sold twenty graders of a construction differing *in detail* from the grader of the Parker patent, considered by this court in 205 Fed. 735. The Special Master examined two of these modified graders in actual service and heard the oral evidence in regard to their construction and operation and a comparison thereof with the machine embodied in the drawings of the patent in suit. The Special Master also inspected machines constructed in exact accord with the drawings of the patent in suit and the machines held by this court in 205 Fed. 735 to be an infringement. The Special Master found the modified machines to infringe.

Complainant's Exceptions.

COMPLAINANT'S FIRST EXCEPTION:

Complainant's first exception is to the finding that the "overhead expense" of the business of manufacturing and selling the infringing graders carried on by the defendant Parker was the sum of $4,120.05, or any other sum. This exception is founded upon the fact that in order to avoid expense and save time a certain stipulation was entered into between the parties.

The proceedings in connection with this stipulation are found upon pages 117 to 123 of the Master's Report.

The specific point that complainant makes is that while for the stipulated period to be taken as a test in order to secure the percentage or pro rata of "overhead" expense chargeable to the grader business as distinguished from the total business of the defendant Parker, the total business in dollars and cents of defendant Parker during such period has been set out and stipulated, and the total "overhead" expense has been set out and stipulated, yet there is no proof nor any stipulation as to the volume or amount, in dollars and cents, of grader business during that period, and, therefore, under the stipulation there is no possibility of computing the percentage referred to. In other words, only two instead of three members or parts of the problem in proportion are given and no example or problem in proportion can be worked with only two of the factors known.

The stipulation [Transcript of Evidence before the Master, p. 121] is that the period from March, 1912, to and including March, 1913, shall be taken for the basis of comparison and figuring the percentage of overhead expense. It will be noted that the total amount of sales of graders, or the total amount of grader business during this period is not stipulated, nor is it set forth in any of the sworn statements filed on behalf of the defendant Parker. The infringing sales of graders extended over the years 1910, 1911, 1912, 1913 and 1914.

On page 23 of the Master's Report the Master says

that "the entire gross expense of running the business "of the defendant was given, and also the gross re- "ceipts of the entire business and the gross receipts "from the manufacture of the infringing device." The difficulty with this finding is that it does not follow the stipulation or the evidence. It was agreed that the period between March, 1912, and March, 1913, should be taken as the basis of figuring the comparative "overhead" expense of the grader business on the old style or Parker patent type, and there is no showing as to the amount of grader business conducted by the defendant Parker between March, 1912, to and including March, 1913. There is no seggregation of the grader business done by the defendant Parker during this time. This same objection also holds as to the period between April, 1913, and April, 1914, for the statement of the grader business done in connection with the new type or modified Parker machines only covers the period from November 7th, 1913, to and including August, 1914. It is, therefore, under the eivdence, impossible to find the necessary elements, either stipulated or proven, upon which to base this proposition, and inasmuch as the defendant Parker assumed this burden, the failure of proof in this regard requires the rejection of any allowance of overhead expense as offset to any gross profits of the infringing business. In this connection it will be readily seen from pages 181 to 187 of the Transcript of Record of the testimony before the Master, that the defendant Parker assumed this burden. It is submitted, therefore, that no allowance of overhead expense can be deducted from the gross profits.

COMPLAINANT'S SECOND EXCEPTION:

In this case an injunction has been issued, restraining the prosecution of thirty-one suits brought against purchasers and users of the Parker patented graders purchased from defendant Parker. The decision of this court upon the grant of this injunction is found in 214 Fed. 550, and the decision of Judge Wellborn in 211 Fed. 985. The theory upon which this injunction was issued was that in this case the complainant should recover, and recover *all* that he had lost by means of the infringement. The evidence conclusively proves and this court has found, as well as the law presuming, that if it had not been for the infringement the complainant would have sold one of his *complete* machines to each of the purchasers of infringing machines. It is, therefore, apparent upon the face of the proposition that if the machines in the hands of the users are to be freed from any claim of the complainant, the complainant must recover all that he would have made had there not been an invasion of his patent rights and a wrongful appropriation of his business by the defendant Parker. There is not a scintilla of evidence to show that the complainant would have licensed the defendant Parker, nor a scintilla of evidence that the complainant would have sold only parts of such machines to the users.

This court says: "The plaintiff derives his profits "from the manufacturing and sale of the fruit grading "machines covered by the patent. This profit consists "of the difference between the cost of manufacture and "the price for which he sells the machines." One of the great objects of the accounting is to totally free

the machines in the hands of the users and they cannot be freed unless the complainant is entirely recompensed for all loss or damage suffered by him by reason of his loss of trade through the sale of the infringing machines. *The infringing machines were sold as a whole.* Not parts or portions of graders were sold by defendant, but whole machines, and there is no presumption that the sales by defendant simply deprived complainant of sales of parts of machines.

The Master has found that at a time prior to the infringement by defendant complainant sold incomplete graders, to-wit, the fruit runway alone, for $175.00 and that complainant's cost of manufacture of that portion of the machine was $57.99, whereas, the evidence shows that the complete machines were sold for $425.00, and the gross cost of manufacture, installation, and sale was $236.05 per machine (if an overhead expense charge of $8.50 be added to the actual cost of manufacture, installation, and sale), making a profit to complainant upon the manufacture, installation, and sale of each complete grader of $188.95. The difficulty with the Master's reasoning is first this: that there is no evidence that during the term of infringement the complainant sold simply the runway portion of the machine alone. The facts and the proofs are otherwise. *The machines were sold as a whole.* The attempt of the Master to apportion as a part of the machine *only a part of it as patented* rests upon an entirely erroneous theory and basis. It rests upon the basis that the said patent does not cover the grader as a whole and this theory is easily seen to be fallacious, when it is considered that neither claim 1

nor claim 10 of the patent in suit specifies any means of supporting any of the devices referred to as the principal elements of such combination. To so construe these claims would be to render the claims void as for incomplete combinations and as calling only for so many and such parts as would not make up a complete or operative device, thereby rendering the claims void for inoperativeness and uncertainty, a position which neither the Master should have taken nor this court can take in view of the final determination by this court that the claims are valid.

It is to be noted that if the claims are to be construed on this accounting as covering nothing more than the parts therein specifically referred to, or in other words, covering only the parts to which the claims are limited by actual words, then the claims do not cover a machine at all, but simply cover a plurality or series of rollers, a non-movable groove guide, and a rope in the guide. The guide is a piece of wooden material which will not stand in the air—it must be supported. The rope to perform any function must be pulled along or driven, and if the claims are thus construed it is readily seen that they do not make up a fruit grader, yet this is the logical construction under the Master's Report of such claims. It is readily seen by inspection of the drawings of Mr. Strain's preferred embodiment of the invention that this wooden guide is properly supported; that the belt is driven by means of proper pulleys and shafting, and that the rollers are driven or rotated by means of belts and shafting, and that suitable bins of some kind are provided to receive the separated fruit, otherwise after the sep-

aration of the fruit it would all roll together again on the floor and the utility of the machine would be missing. Such a construction cannot be placed upon the claims of the patent. The claims are for a certain combination *"in a fruit grader"* and it is clear that a guide and rope and a plurality of rollers without means for mounting or supporting the same do not form any fruit grader. The rule of construction of patent claims is that the term *"in a fruit grader"* implies all of the other necessary parts to make up an operative machine. The claim by such reference does not limit the scope of the claim to any particular type of such means or mechanism, but some means or mechanism for these purposes is implied as necessary and is considered as within the claim. Complainant submits, therefore, that it is just as fair to exclude complainant's profit on the pulley and on the supports or legs upon which the machine rests as it is to exclude the profit which he made *upon erecting the bins which receive the fruit* or any other portion of the machine, and in this is the real error of the Master's Report with respect to the question of damages.

Passing for the present the question of overhead expense of $8.50 per machine for the purpose of deduction hereafter, and figuring the damages in accordance with complainant's sworn statement, the following is submitted:

The statement filed by complainant [Complainant's Exhibit 5, pp. 237-242 Transcript of Record] is admitted and stipulated by defendants to be a true statement of complainant's cost of manufacture (and sale), with the reservation of the items of overhead expense

set forth in the statement at $8.50 per machine submitted to the Master for his determination. Complainant will assume this allowance as thus fixed by complainant's statement and testified to by complainant to be correct, and submits that the cost of a complete machine as marketed by complainant is $236.05. Complainant's proven sale price (his established price at the time of the commencement of the infringement and throughout the term thereof) is $425.00. [Record p. 39.] Complainant's profit on the sale of a machine is, therefore, $188.95. On a small size, single, or half machine, the cost is one-half the cost of the large machine, or $118.02. The established sale price thereof is $225.00 [Record p. 39], and complainant's profit on such small size, single, or half machine is $106.98.

Defendant Parker's original statement shows he made and sold seventy-two (72) large, double, or whole sizers and thirteen (13) small, single, or half sizers or graders, to which latter, however, must be added one small size, single, or half grader sold to Benchley Fruit Company and omitted from statement. [Parker's testimony, Record p. 51, Q. 2-3.] These are all machines of the type of Complainant's Exhibit "Parker Patent." Complainant's damages by reason of the deprivation of sales of these machines are therefore

Profit of $188.95 on each of 72 machines. . . $13,604.30
Profit of $106.98 on each of 14 machines. . . 1,497.72

In addition to these machines the evidence shows that defendant Parker sold two large or whole machines and two upper or grade-way parts only, for shipment to Porto Rico. On these complainant's profits would have been, and therefore his damage is

Profit of $188.95 on each of 2 machines....$ 377.90
Profit of $126.12 on each of 2 grade-ways.. 252.24
Making a total damage on machines sold by defendant Parker of the type of Complainant's Exhibit "Parker Patent" 15,732.16

In computing the profits lost by complainant by the sale by defendant Parker of the two upper portions or grade-ways in the Porto Rico sales, complainant has taken the cost of $61.49, as shown in complainant's statement to be the total cost of the grade-ways shipped and installed, and excluded therefrom the items of cost of labor for erection $10.00 (as machines shipped to Porto Rico were shipped in "knocked down" condition), the cost of freight $1.61 (as the machines were sold F. O. B. Riverside), and the cartage of $1.00 for the same reason. Eliminating these items from the cost of the machines as set forth in complainant's statement, shows the actual cost of the parts sold to be $48.88.

Defendant Parker has filed a supplemental statement showing the sale of eighteen (18) large, double, or whole sizers of the new style and two (2) small or single sizers of the new style or modified type. These being infringements deprived complainant of sales and profits, and he is entitled to damages on account thereof as follows:

Profit of $188.95 on each of 18 machines....$2,401.10
Profit of $106.98 on each of 2 machines.... 213.96

Recapitulation of Damages.

TYPE OF PARKER PATENT.

72 machines at $188.95	$13,604.30
14 machines at $106.98	1,497.72
2 Porto Rico machines at $188.95	377.90
2 Porto Rico grader runways at $126.12	252.24
NEW TYPE.	
18 machines at $188.95	2,401.10
2 machines at $106.98	213.96
Total damages	$18,347.22

There are no "unpatented features" of the machines in controversy as manufactured by either complainant or defendant Parker within the alleged rule of law asserted by defendants. On the contrary, both of the claims held to be infringed call for a complete machine, to-wit, a fruit grader. It is true that these claims do not point out each and every one of the pieces of wood, bolts, screws, pulleys, etc., which are to comprise the machine in its completeness, but only point out the novel features requisite to embody in such machine the inventive idea produced by Robert Strain. The object of the machine or grader is to separate the fruits according to their respective sizes. The Strain reissue patent shows the bins which are a necessary part of the machine to permit or enable the machine to operate to effect its purpose. Without some kind of bins or without partitions separating the bin spaces into separate receptacles the machine would be without utility. It is true that the Robert Strain patent, so far as claims 1 and 10 are concerned, is not limited

to a specific construction of bin, but bins are required to make the invention operative. It would be as correct and accurate to contend that the means, to-wit, the drums and pulleys, for driving the belt members are not a part of the "patented features" within the meaning of defendant's rule, as it is to contend that the bins are not a part of such so-called "patented features." It is true that so far as the scope or breadth of the claims is concerned, it is immaterial what particular construction of either *bins* or of *means for driving the belt members* are employed, but some construction of bins as well as some construction of such driving means must be employed to embody in the machine Robert Strain's invention for his invention was a fruit grader—a machine for separating the fruits according to their sizes, and as said by Robert Strain in his specification:

"Below the grade-rollers are as many bins V as "there are grade-rollers, which are adapted to *hold* the "fruit which will pass between the grade-roller and "guide." [Strain Specification, p. 1, lines 61-64.]

"If there should be a large quantity of the fruit of "a single grade intermixed with a small quantity of "fruit of different grades, this feature is very desir- "able, as a number of *bins* may be filled with fruit of "the same grade." [Strain Specification, p. 2, lines 16 to 21.]

In the drawings Robert Strain shows "bins V" for holding in separated condition the respective sizes or grades of fruit. To say that the bins are no part of the Strain grader is thus demonstrated to be a fallacy.

If then the bins are a part of the Strain grader and defendant Parker has provided bins for this same purpose, it cannot be said that the bins he provided do not form a part of the "patented features." It is immaterial whether the bin construction that Parker has used is the same bin construction that is shown or described in the Strain patent. This suit is not based upon a particular construction of bin, and the bin feature is merely incidental. It is a necessary feature, but it is immaterial what its particular construction is. The defendants' position is not well taken as applied to this accounting for another reason which, if the question were an open one for the Master to determine, would be decisive of the defendants' contention.

In this connection it is to be noted by reference to Complainant's Exhibit Number 5 that the portion of the machines which is included in the Master's estimate of damages includes the sprocket chain, the rope sheaves, the gears, and all of the parts for mounting the plurality of rolls or rollers, the groove guide and the rope, and means for driving the rope. Why were these parts part of the combination, although not specified therein, and why were not the bins or the rest of the complete machine a part of the combination? If the term "in a fruit grader" implies part of these parts and included within the claim for the purpose of accounting, why are not all of the parts necessary to make a complete machine included? Complainant does not contend that either of these claims specify or claim or are limited to a specific kind or construction of sorting means or bin construction, but does contend

that such parts are included in the general term "in a fruit grader," and for the purpose of accounting the profits on the machine as a whole should have been figured so that within the rule of our Circuit Court of Appeals, the complainant shall recover from the defendants "full compensation" in the form of his profits, which consist of the difference between the cost of manufacture and the price for which complainant sells the machine, the Court of Appeals having found that "the plaintiff is a manufacturer and seller "of the machines covered by his patent, and the sole "profits which he derives from his patent are those "arising from the manufacture and sale of the ma-"chines covered thereby." If this language is construed as limited to a part only of the machine manufactured by complainant and sold by him, the finding of the Court of Appeals is construed so as to be incorrect in point of fact, for the evidence shows that the defendant, by virtue of the fact that he controls this complete machine sells the complete machine and makes a large profit on the complete machine, that is found by the Master.

This is not a case where the patented combination is an attachment to a pre-existing machine and the market value of the machine as a whole is only partially enhanced by the patented attachment. The patent covers a fruit grader as a whole. The Master has found that "The defendant should make good the "depreciation in the value of the plaintiff's enjoyment "and use of the invention which his own wrongful "act has caused." It does not appear from the Master's finding what portion of the machine he includes in his

finding on page 28 that complainant's selling price was $175.00 each and his cost was $57.99 each. The proofs show a sale price of $425.00 for each complete machine, and Complainant's Exhibit 5, pages 1 and 2, show the itemized cost of building or making, erection, and sale of the complete machine—this entire cost at $236.05, which includes two items aggregating $8.50 overhead expense. The entire cost of manufacture then is $227.45. Tabulating this in the same manner as Schedule "C," page 29 of the Master's Report, we have

Selling price of 105 sizers at $425.00 each. . $44,625.00

Net manufacturing cost of 105 sizers to plaintiff, as shown by Plaintiff's Exhibit 5, after deducting overhead expense item of $8.50 from $236.05 ..... 23,892.75

Profit to plaintiff not allowing any overhead expense $20,732.25

Complainant submits that the damages in this case for the total of 105 machines, including both the Parker patent type and the new or modified type of machines, is then $20,732.75.

If the Master's Report is sustained against complainant's third exception this will be reduced by the Master's allowance of $815.85 "overhead expense," leaving a net damage of $19,916.40.

The Master has found and the proofs show that the defendant Parker sold twenty (20) of his new style or modified Parker graders and eighty-five (85) machines of the Parker patent type, held to be an infringement by our Circuit Court of Appeals.

COMPLAINANT'S THIRD EXCEPTION:

This exception relates to the allowance or deduction as proportionate overhead expense of complainant's grader business in the sum of $815.85. The exception to this is based upon the following theory: That the evidence shows that complainant's plant was in all respects adequate to have enabled him to manufacture, and his entire equipment sufficient to enable him to have sold and installed the 105 graders manufactured and sold by the defendant Parker during the four years and a half covered by the Master's accounting; that no additional buildings, machinery, equipment, tools, insurance, taxes, or any other overhead expense in the true sense would have resulted from any such increase to complainant's business. It is further shown in the evidence that all of these items which naturally go to make up the overhead expense of complainant's business have been actually paid out of the proceeds of complainant's business. Therefore, complainant has borne this overhead expense *and should not have had to bear it again* if he had manufactured during these five years these 105 machines; that is to say, that as a matter of fact complainant has paid this $815.85 overhead expense which is thus deducted by the Master from complainant's profits, so that complainant has in fact lost this part of the proportion of overhead expense by the deprivation to him of these sales. In other words, the proportion of $815.85 as the amount of overhead expense which would otherwise have been charged against the manufacture of these 105 graders is in reality the dividing up of an overhead expense which complainant has sustained, borne, and paid, and

which would not have been increased if he had increased his business to the amount of 105 machines. In other words, complainant's position is that the Special Master's finding compels him to bear and pay this $815.85 of overhead expense twice.

There is another aspect to this overhead expense charge of the Master against the complainant's damages. In this connection complainant desires to emphasize the fact that every stick of material, every bit of machine work, every item of labor, every item of drayage, or other expense, either in the making or erection in place of these machines is set forth in detail in Complainant's Exhibit 5, showing the cost of these machines to be $227.55, eliminating the two items aggregating $8.50 as overhead expense, and the fact is that this is exactly the loss to the complainant. If this infringement had not occurred not only would complainant have sold these machines at the price of $425.00 without any increase to his overhead expense, but he would have sold large amounts of other packing house equipment which went to make up the contracts as a whole. This is illustrated by the contracts offered in evidence by complainant before the Master. The contracts of the defendant show that the equipment was ordered as a whole for the whole packing house.

COMPLAINANT'S FOURTH EXCEPTION:

This exception brings before the court the interpretation by this court, as reported in 214 Fed. page 550, of the interlocutory decree entered in this case under the mandate of this court, and under which this accounting is being taken. Complainant insists that this

decision and opinion is the law of this case and that it is the interpretation (by the court of last resort which ordered this interlocutory decree) of the legal intendment and effect of such decree and that this court is bound by such interpretation and is to look to such interpretation as the law of this case and not to other decisions of other courts in other cases.

Complainant's position is that this court directed a recovery in favor of complainant of *both profits* realized by the defendants or either of them *and the damages* suffered by the complainant. If this position is correct it is clear that the Master's theory is wrong for he has awarded to complainant the profits realized by the defendant Parker and such portion of the damages suffered by complainant as exceed the profits realized by the defendant Parker. The Master finds complainant's damages to be the sum of $11,470.20. If he had found in complainant's favor for damages alone he would have directed judgment in favor of complainant for $11,470.20. Did he follow the interpretation placed by the Circuit Court of Appeals upon this decree and grant complainant both profits and damages when his recommendation of profits and damages amount only to the sum of $11,470.20, the amount of damages which he found complainant had suffered? The Circuit Court of Appeals has said that complainant's damage is the profit which he would have made had he made the sales. Then if complainant is entitled also to defendants' profits something must be added. The Master has found defendant Parker's profits to be the sum of $5,232.85. Is it not logical to say that if complainant is entitled to both the damages he has

suffered and the profits that defendant Parker has made there should be an addition to the sum of damages, not that when the computation is completed the amount shall be simply the damages? It is believed that the court fully understands complainant's position in regard to this exception from the oral argument. Complainant's position is fully sustained by the interpretation given to the decree herein by this court, which says:

"In the present case, not only has it been decreed "that the plaintiff is entitled to actual damages suf- "fered by him by reason of the infringement of his "patent, but he has also been awarded the profits re- "ceived by the defendants by reason of such infringe- "ment."

214 Fed. 550, p. 555.

The decree awards complainant *both* the profits derived by defendants and the damages sustained by complainant. No appeal from such award has been taken by defendant and the decree stands unimpeached. The sole question before the court at this time is—Does the judgment as entered award complainant *both* the profits and the damages or only in effect the damages?

The Master found the damages to amount to $11,470.20

The profits to amount to 5,232.85

The decree awards as damages only .....$ 6,237.25

Clearly this does not follow the decree.

Conclusion.

Complainant therefore submits:

FIRST: Complainant's first exception must be sustained as no proof or showing has been made upon which the proportion of so-called "overhead" expense of defendant Parker's business chargeable to the infringing grader business can be determined in accordance with the stipulation, which stipulation is the rule of law of the case in this regard.

SECOND: Complainant's second exception must be sustained. To hold otherwise is to permit the defendant Parker to realize gain from his own wrongful act. To hold otherwise is not to follow the decision of our Circuit Court of Appeals (214 Fed. 550) construing the interlocutory decree herein and in which it is definitely stated and held that complainant's damages are the profits which he would have made from the sale of the complete machines.

In the case of Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 125, the Circuit Court of Appeals says:

> "Now when we remember that there are two "classes of patents, one for simple elements, and "another for combinations of elements, and the "distinguishing characteristics of the two classes, "it is readily seen how impossible it is to apply "this language to the other class of patents than "those of the class specified. In a combination "patent there are no unpatented features in the "sense that they are separable from patented ones, "and no one of the elements is patented. They "may all be old and not patentable at all unless "there is some new combination of them. The

"point to be emphasized is that the law looks not "at the elements or factors of an invented com- "bination as a subject for a patent, but only to "the combination itself as a unit distinct from its "parts, and in such case there could be no com- "parison of patented or unpatented parts."

The Master has found:

"It is not a fact that the whole of Strain's invention "resides in the traveling belt and adjustable rolls, but "it extends to all other parts of the grader."

This brings this case within the authority of Brennan & Co. v. Dowagiac Mfg. Co., 162 Fed. 472. In that case the court said:

"The claims of the patent in suit are not re- "stricted to single things, but some of them—the "first, for instance—include the several elements "which go to make up the seeding part of a drill, "in combination. It covers them all as one whole. "Every one is made material by including it in "the combination. The spring devices are not "thereby patented. For the purpose of the claim "and the patent thereon, they are on the same "footing with all the other parts of the drill, how- "ever old and common they may be. Any one "might make and sell each and every part, or "any lesser or larger combination of such parts, "including the spring device, without infringing "the patent, provided, of course, they are not in- "tended to contribute to the making up of the "entire combination covered by the patent. But "one part in a combination is no more patented "than another. All in association are patented.

"The parts of a drill consist of a carrier, a seed "box or reservoir, and the seeding apparatus. It

"is to the latter that the attention of inventors "has been principally directed. The carriers and "the seed box are old and simple. Of them it is "enough to say that no one appears in this case "to have any patent on them.

"The case here is not a patent for an improve- "ment upon another article, which does not cover "that other article, but only the improvement made "upon it. The patentee cannot in such case ex- "tend his invention over the thing improved, if "the latter is patented. If not, he may appropriate "it, as others of the public may. The distinction "is well illustrated by the improvement of the "harvester in Seymour v McCormick, 16 How. "480, 14 L. Ed. 1024. When, therefore, the de- "fendant sold one of the plaintiff's machines, he "sold that which in all its associated parts was "covered by the patent; and a dowagiac drill, "without the Hoyt patented combinations, would "be but the fragment of a drill and have no dis- "tinctive character. The invention was not an "addition to an otherwise complete machine."

See also

Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441.

THIRD: Complainant's third exception must be sustained. To hold otherwise is to compel complainant to twice bear or pay this item of so-called "overhead" expense.

FOURTH: The decision of this court, reported in 214 Fed. 550, is the law of this case, and this question is not an open one here which can be here reviewed. This decision ordered a recovery of both the profits

made by the defendants and the damages suffered by complainant and determined the measure of complainant's damages as "the difference between the cost of "manufacture and the prices for which he sells the "machines." (214 Fed. 554.) To award complainant defendant's profits and part of complainant's damages is not to award the defendant's profits and the complainant's damages.

Resume.

For the convenience of the court, the following statement is appended to show the change in dollars and cents in the judgment rendered herein in case of the sustaining of the respective exceptions:

1. If complainant's first exception is sustained and complainant's fourth exception overruled, no change whatever would be made in the amount. The first exception involves the sum of $4,120.05 profits, but if the whole profits derived by the defendant Parker are allowed and taken from the whole damages suffered by complainant, as is shown in manner of computation by the Special Master increasing the amount of profits by the sum of $4,000.00, would not affect the final result. If, however, exceptions one and four are both sustained, the effect of exception one is to increase the amount $4,120.05.

2. If only complainant's second exception is sustained, the damages found by the Master will be increased to the sum of $19,916.40, being the loss of profits on the machines as a whole and not excluding the bins.

3. If complainant's third exception only is allowed, it will simply increase the damages by the sum of $815.85.

4. If complainant's second and third exceptions are allowed the total damages will be increased so as to amount to $20,732.75.

5. If complainant's fourth exception is allowed it will require the *addition* of the amount of profits realized by the defendant to the amount of damages instead of a subtraction therefrom as computed by the Special Master.

It is believed that the court will find each of the items figured in the foregoing recapitulation correct.

In conclusion, therefore, it is submitted that the total damages should have been found to amount to the sum of $20,732.75 and that the total profits should have been found to amount to $9,352.90.

Inasmuch as the present decree leaves the defendant Parker an actual profit from the sale of the infringing machine and a gainer by the infringing acts and, in fact, leaves the complainant an actual loser of profits which he would have made had the infringement not taken place, it is seen that full justice has not been done by the decree appealed from.

Respectfully submitted,

FREDERICK S. LYON,

Solicitor for Complainant-Appellant.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Riverside Heights Orange Growers' Association, a corporation, and George D. Parker, *Appellants,* vs. Fred Stebler, *Appellee.*	No. 2772. On Appeal by Defendants From Final Decree.

BRIEF ON BEHALF OF COMPLAINANT-APPELLEE.

FREDERICK S. LYON,
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BRIEF ON BEHALF OF COMPLAINANT-APPELLEE.

This appeal comes before this court to review a final decree entered October 30, 1915 [Transcript pages 339-340], confirming the report of the special master appointed by the interlocutory decree ordered by this court in complainant's favor for the relief prayed in the bill of complaint.

Necessarily the first thing to be ascertained is: What is to be reviewed?

Had defendants filed no exceptions to the master's report, none of the findings of the master and none

of the proceedings before the master would be open to review by this court.

It is necessary, therefore, to first ascertain to what finding or findings of the master or what proceeding by the master were properly brought by defendants before the District Court for review, for the review in this court cannot be, with respect to matters not properly challenged or excepted to in the court below, in accordance with the law and equity rules. If the defendants' assignments of error seek a review of a finding or findings by the master which were not challenged or not properly excepted to to bring the same before the District Court for review, then such matters are not before this court for review.

The exceptions filed in the Ditsrict Court by defendants are set out on pages 331-333, and refer *solely* to the consideration and determination by the master that twenty (20) graders of a modified construction were infringements. Such graders were manufactured and sold by defendant Parker (some of which were used by defendant Riverside Heights Orange Growers' Association) after the interlocutory decree and the service of the writ of injunction upon defendants.

This is clearly the purport and intendment of these two exceptions. The first of these exceptions is as follows:

"First Exception: For that the said master, in his said report on file herein, has found that since the date of the interlocutory decree entered in the above-entitled suit on the seventh day of November, 1913,

one of the defendants herein, to-wit, George D. Parker, by the manufacture and sale of a differently constructed apparatus to the one adjudged to have infringed complainant's reissue letters patent No. 12,297, has further infringed the plaintiff's said patentd device, and found that for such new machines the said defendant—George D. Parker—was liable unto the plaintiff for profits derived therefrom, and in addition thereto for damages unto the said complainant, whereas the said master, under the evidence presented and in accordance with the law, should have found and reported unto this Honorable Court that the said device, specifically referred to on pages 3, 4, 5, 6 and 7 of the said report, so manufactured and sold by the said defendant—George D. Parker, since the said seventh day of November, 1913, was substantially a different machine from the Parker machine held by the court herein to have been an infringement of the complainant's said patented device, and that the same was not and did not constitute an infringement of the said reissue letters patent No. 12,297, and should not have allowed any profits and damages unto the complainant by reason of the said manufacture and sale of the said new fruit grader so manufactured and sold by the defendant, George D. Parker, since the date of the said interlocutory decree herein."

Nothing could be clearer than that this "First Exception" challenges solely and only the finding that these graders manufactured, sold and used after the service of the injunction, infringe either claim 1 or 10 of the reissue patent in suit.

Defendant filed only two exceptions to the master's report. The other is:

"Second Exception: For that the said master, in his said report, found that the plaintiff should recover from the defendant, George D. Parker, the sum of $5,232.85, as gains and profits, and an additional sum of $6,237.35 as damages, or a total amount of $11,470.20, as profits, gains and damages due unto the plaintiff herein, whereas the master should have found and reported the liability of the defendant unto the plaintiff limited to the gains, profits and damages found from the evidence herein resulting from the machines manufactured and sold by the defendant, George D. Parker, and held by the court herein to have been an infringement of the plaintiff's reissue letters patent No. 12,297."

This exception challenges the right and duty of the special master to consider and determine the question whether these subsequent graders infringe. This exception points out no other error and asks review only of defendants' contention that "the master should have * * * limited" his consideration and report to "the machines" * * * "held *by the court* herein to have been an infringement of the patent in suit. Any other construction would render the exception bad as duplicitous and uncertain. The clear intendment of this exception was solely to challenge the action of the master in considering and determining the subsequent machines to infringe and awarding profits or damages therefor.

If it be attempted to construe this second exception

as referring both to the machines "held *by the court* herein *to have been* an infringement" and also to the machines determined by the master to be an infringement, then all that portion of the exception including and following the word "whereas" is mere surplusage and idle words. This cannot be the true construction. The true construction very clearly depends on the word "limited" and upon all the words following. If not limited, as now insisted upon by complainant, the exception is bad. It is too general, too ambiguous, and does not distinctly point out the alleged error to which the exception is directed.

In Sheffield Co. v. Gordon, 151 U. S. 285, 290, the court says:

> "Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies."

In Street's Federal Equity Practice, Vol. 2, § 1475, it is said:

> "It is frequently said that exceptions to a master's report are in the nature of a special demurrer. This statement is true in so far as it is taken to imply that the exceptions must be specific and that they lie only upon matter contained in the report or in the papers and proof on which the report is based and which are referred to in it. A more helpful analogy, perhaps, is that which would liken the exceptions to an assignment of errors upon appeal or writ of error to a higher court."
>
> "It is an elementary rule of equity procedure that exceptions to a master's report must point out

specifically the error, or errors, relied upon by the party excepting to the report."

Street's Fed. Eq. Pr., Vol. 2, § 1485;
Sandford v. Embry, 151 Fed. 977, 983;
Story v. Livingston, 13 Pet. 369.

It is submitted, therefore, that defendant's exceptions to the master's report raised only two questions for review:

1. Alleged error by the master in considering and determining whether the subsequent or modified graders infringed, and in finding that they did infringe.

2. In awarding profits and damages on both the Parker patented type of grader, *held by the court* to infringe, and the subsequent or modified type, held by the master to infringe, and in not limiting the award to the Parker patented type.

It is further submitted that upon an appeal from the order or decree of the District Court sustaining the master's report, not matters or things could be assigned as error which are not pointed out in the exceptions to the master's report. In other words, the assignments of error on this appeal can only be two, i. e.: (1) That the court erred in overruling defendants' first exception; (2) that the court erred in overruling defendants' second exception.

The assignments of error [Tr. pp. 344-345] attempt to challenge not only the consideration by and finding of the master that the defendants' subsequent or modified machines infringed and the award of the master

of profits and damages on account of such subsequent infringement, *but also* attempt to challenge the master's findings as to profits and as to damages arising from the manufacture, use and sale by defendants of the Parker patent type of machines, held by this court to be an infringement, and to which defendants' second exception to the master's report claims the accounting must be "limited."

Complainant therefore submits that defendants are not in a position to urge or ask consideration in this court of their second or third assignments of error, and that review in this court can be asked only of the questions challenged by the exceptions to the master's report and to the action of the District Court in allowing damages under sections 4919 and 4921 of the Revised Statutes upon the theory that the defendants have been wilful infringers and stubbornly litigious. This last allowance will be found to rest in the sound discretion of the trial court.

This was the interpretation and construction placed upon defendants' exceptions to the report of the special master, not only in the argument in the District Court but in the brief submitted by defendants' counsel, as appears from the following quotation from defendants' brief filed on the hearing of the exceptions to the master's report in the District Court:

"On behalf of the defendant, two exceptions have been taken to the master's report, each of which involve the question as to whether or not the defendant is liable unto the complainant for the manufacture and sale of the new fruit grader placed on the market by

the defendant since the entry of the decree in the present case."

Infringement by Modified Forms of Parker Grader.

The history of this litigation prior to the accounting is set forth in the opinion of this court, reported in 214 Fed. 550; the opinion of this court finding the Robert Strain reissue patent number 12,297 (sued on herein) valid and infringed and interpreting and construing the same, is found in 205 Fed. 735.

This matter, therefore, comes before the court at this time in the following condition:

The validity of the patent in suit and of the claims sued on (to-wit, 1 and 10) have been finally determined by the court of last resort and such matters are *res adjudicata* between the parties. The court of last resort has construed the patent and claims one and ten thereof and defined the character of the invention produced by Robert Strain and its scope. Such adjudication and definition is *res adjudicata* between the parties. It is submitted that it was the duty of the special master and of the District Court to follow the interpretation thus placed thereon by this court, for such interpretation and construction were not only *res adjudicata* but the law of the case.

The position of complainant with respect to the modified forms of Parker grader as infringements is exactly the same as complainant's position with respect to the so-called Parker patent type of infringing grader. This is illustrated and made apparent by reference to appellant's (complainant's) opening and reply

briefs in the Circuit Court of Appeals, upon which appeal the decision in 205 Fed. 735 was rendered.

In short, complainant's position there, as now, may be stated to be as follows:

Robert Strain's inventive idea was the provision of means whereby each grade opening or discharge opening in a fruit sizer or grader might be rendered within the control of the operator without the necessity of the operator co-incidentally changing or altering any adjacent discharge opening or grade opening. As pointed out in complainant's opening brief on said appeal, and as found by this court in 205 Fed. 735, the old Ish patent or California grader contained the "long "horizontal roller, with graduated sections or steps, "turned down from a larger diameter to a smaller one, "resembling an inverted telescope; and a flat endless "belt, so adjusted that it was longitudinally parallel "with the axis of, but a little lower than, and with a "slight lateral inclination from the horizontal toward, "the roller." (205 Fed. 736.)

With such a grader the operator could not adjust or change one of the grade openings or sizing openings without affecting the size of an adjacent grade or discharge opening. This was found to be the fact by this court and is conclusively proven by the unanimous agreement of the testimony of all the witnesses in the case. See appellant's opening brief in the Court of Appeals (case 2232), pages 61 to 63, where will be found a digest of the testimony in this respect.

Complainant urged upon the Court of Appeals that the Robert Strain invention did not reside in details

of construction; that it was a highly important invention and one of material scope; that it belonged to that class of inventions where conception of the inventive idea by the inventor was what was lacking in the prior art; that given this inventive idea any mechanic could embody the invention in a number of different forms. This court said: "The invention, we think, was an "important and distinct advance in the art and is not "anticipated by former patents." We thus find that this court has adopted complainant's view, to-wit, that the invention resided in the broad conception of the necessity for and a means of securing control by the operator of each discharge or grade opening without affecting the adjacent discharge opening or grade opening. The language just used in this brief will be seen to avoid the use of the word "independent." The term "independent" as used in complainant's briefs and in this court's opinion means this: that such adjustment of a given grade opening or discharge opening is "independent" of the other grade opening *in the sense* that the adjusting of one grade or discharge opening does not affect the size of fruit discharged from the adjacent discharge or grade opening. That is the kernel or essence of Robert Strain's invention. It is obvious that many ways may be employed for securing this highly advantageous interrelation of parts and result. This court says, in referring to Robert Strain's invention, "the essence of which is the combination "with a traveling belt (common to the Ish, Strain, and "Parker machines) of a series of independent rotating "units arranged in longitudinal succession parallel with

"the belt, each transversely adjustable." The defendants harp upon the term "independent" as thus used by the Court of Appeals. Complainant submits that in construing this language or finding it should be construed in the same manner as any other instrument, to-wit, attention should first be given to what is the object to be secured. It is clearly apparent that whether the "independent rotating units" are mechanically driven by means of belts, or simply allowed to rotate by the action of the fruit, is immaterial, for this court held that the Parker patent type of grader infringed, although the rollers thereof had no driving belts or driving means. It is true that in the drawings of the Strain patent he has shown a cross belt for each roller section, but the means of driving has nothing whatever to do with the transvers adjustment of each unit toward and away from the belt to secure the adjustment of the discharge opening formed between such belt and such roller section, and it is immaterial whether the entire length of the roller side of the fruit runway formed by the series of rollers and belt, turns in synchronism or at different speeds, or whether such rotation is by means of the fruit, or by means of one and the same rotative power or element or by different rotative powers or elements, and the term "independent" as thus used by the Court of Appeals does not refer to an independence as to rotation, but to an independence of the rotating units *as to operative adjustment* toward and away from the belt *to form the operative* grade opening or discharge opening. In other words, the word "independent" as thus used by this

court refers to that feature which embodies the inventive idea set forth in the Strain patent, to-wit, an adjustment of the rotating units "independent" of each other in the sense that the grade opening or discharge opening formed between such rotating unit and the belt may be controlled by the operator without affecting the size of fruit discharged through an adjacent discharge opening or grade opening.

It is well known that a given "invention" may be variously embodied in machines for a given purpose. That no two mechanics will select exactly the same devices for doing a given thing in a machine. An inventor is only required to show in his drawings or describe one form in which his invention may be embodied.

In this connection it is to be borne in mind that in the particular embodiment of the Robert Strain invention illustrated in the drawings in the patent in suit and described in detail therein, while the roller sections are with adjustable means at each end so that each roller is mounted totally free from connection with the preceding or succeeding roller, still the grading opening or discharge opening is formed at the end of the roller toward the feed end of the machine and the end away from the feed end of the roller performs no function in grading, being simply a wall along which the fruit passes, all of the fruit that will be discharged being discharged in the first third of the roller and between the roller and the belt. In this respect corresponding exactly with the functions of the roller sections in the so-called modified Parker ma-

chines, and this rear end portion of the roller sections is merely idle or non-grading space in both the embodiment of the invention shown in the drawings of the Strain patent and in the modified Parker machines. This is the same idle space that is referred to by this court on page 739 of 205 Fed., where the court refers to the Parker patent type of grader and says:

"The guide arms and the rollers thus form one con-
"tinuous side or wall of the runway."

and

"So far as the sorting or separating of the fruit
"into desired sizes is concerned, precisely the same
"result is reached by the use of the same means op-
"erating in the same manner. The truth of this prop-
"osition is strikingly illustrated in appellant's brief by
"a cut of defendants' machine as it appears with the
"guide arms eliminated and the several roller units
"brought into close proximity."

See appellant's reply brief (case 2232), page 20.

This illustrates the fact that this court found the inventive idea of Robert Strain to exist in the control of the respective grade openings or discharge openings (formed between the roller sections and the traveling belt) by the operator at his will without affecting the size of fruit discharged through the adjacent grade opening or discharge opening, and the Court of Appeals says of this invention:

"While the invention is not basic or primary, it is
"substantial and important, and is, therefore, entitled

"to a fair range of equivalents. Continental Paper "Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405."

The question before this court for review is one of fact. The special master's finding that

"The modified Parker machines have all the elements "and perform all the functions of the plaintiff's patent, "as defined by the Circuit Court of Appeals. The "several rollers of the modified machines perform the "same function in substantially the same manner as in "the Strain invention and in the previous Parker "device."

Master's Report, Tr. p. 286.

"The adjustment of the grade openings in all these "machines, the Strain, the Parker patent, and the mod-"ified Parker, is the adjustment of one grade opening "independent of the effect upon the adjacent grade "opening."

Master's Report, Tr. p. 290.

The master's findings of fact will not be disturbed unless the court has before it all of the evidence taken by him, or at least all of the evidence which was before him relative to the particular finding or findings which are challenged.

McCourt v. Singers-Bigger, 145 Fed. 103-112;

Wheeler v. Abilene N. B. Bldg. Co., 159 Fed. 391-392;

Sheffield & B. Co. v. Gordon, 151 U. S. 285-293.

The master's findings of fact must be taken *prima facie* to be correct.

McNulty v. Wiesen, 158 Fed. 221.

Every reasonable presumption is in their favor, and they are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.

Tilghman v. Proctor, 125 U. S. 149;
Callaghan v. Myers, 128 U. S. 666;
Crawford v. Neal, 144 U. S. 596;
Davis v. Schwartz, 155 U. S. 636-639;
Girard Ins. Co. v. Cooper, 162 U. S. 538;
Kimberly v. Arms, 129 U. S. 512;
Trust Co. v. Cooper, 162 U. S. 529;
Camden v. Stuart, 144 U. S. 104.

On matters of fact the master's findings have every reasonable presumption in their favor.

Cimiotti Unhairing Co. v .American Co., 158 Fed. 173;
Taintor v. Franklin Bank, 107 Fed. 825, 826.

The master's findings of fact where there is conflicting evidence have the force and effect of the verdict of a jury in a trial at common law.

Street Fed. Equity Practice, Sec. 1510, p. 912;
Dillingham v. Moran, 105 Fed. 933-936;
Missouri Pac. Co. v. T. & P. Co., 33 Fed. 803;
Central Co. v. Texas Co., 32 Fed. 448;
Murphy v. Southern R. R. Co., 99 Fed. 469;
Davis v. Schwartz, 155 U. S. 631;
Foster. Fed. Practice (4th Ed.), p. 997.

The question of infringement is "a question of fact "for the jury to determine on all the evidence which "the case might present."

Royer v. Schultz Belting Co., 135 U. S. 319;
Transit Co. v. Cheatham Co., 194 Fed. 963.

In the case of

Wilson v. Barnum, 8 Howard 258,

the Supreme Court had before it the question of jurisdiction of the Supreme Court over a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania in a patent case. The certificate was attempted to be made under the Act of 1802. (2 Stat. at Large 159.) The question involved in the certificate was whether a certain device used by the defendant was an infringement of the Woodworth patent. The Supreme Court held that under such statute the only matters which could be so certified for the determination of the Supreme Court were matters of law and that the question of infringement was one of fact, and dismissed the certificate for want of jurisdiction. Mr. Chief Justice Taney delivered the opinion of the court and said:

> "The question thus certified is *one of fact,* and "has been discussed as such in the arguments of- "fered on both sides. It is a question as to the "substantial identity of the two machines."

It is clear that the master's findings of fact in the more limited sense are not to be disturbed by the court. In this sense the master's findings of fact are those

which pertain to the mechanical construction of the modified or new type Parker machines, and these findings of fact are based upon the testimony of the defendant George D. Parker and the countervailing testimony of complainant and Arthur P. Knight, *and the inspection and observation* of these machines *by the special master,* both in actual use and under certain test conditions carried out or carried on by defendant Parker at the packing house of defendant Riverside Heights Orange Growers' Association in the presence of the parties to this suit, the special master, and the attorneys.

The special master's finding is that the only difference between these modified or new type Parker machines and the machines of the Parker patent, held to be an infringement by our Circuit Court of Appeals, resides solely in the roller side of the fruit runway. There is no possibility of contesting the correctness of this finding of fact, for the evidence shows that these are the same identical machines that were first built as machines of the Parker patent type and that the only changes that have been made in them have been in the roller side of the fruit runway, so that all of the elements of both claims one and ten of the patent in suit necessarily must be found in this new type or modified Parker machines, other than those elements which refer distinctly to the roller side of the runway. This fact eliminates the necessity of any consideration of any portion of the machine, other than the roller side of the runway, as expressed in claims one and ten, and narrows the question before the court down to the

question: Does the roller side of the runway in the new type or modified Parker machine perform the same or substantially the same function and in the same or substantially the same manner as the roller side of the runway in the Strain invention? If this question is answered in the affirmative infringement is determined.

In construing this Strain invention this court said:

> "While the invention is not basic or primary, "it is substantial and important, and is, therefore, "entitled to a fair range of equivalents."

The Supreme Court in its decision in the Paper Bag case (210 U. S. 405) has reviewed the entire question of scope of letters patent and the interpretation to be placed upon combination claims and has distinctly set forth the rule with regard to the doctrine of equivalents as applied to claims for combinations. This is the last word of the Supreme Court in this connection and it is one of the most important decisions on questions of patent law. This decision is cited and quoted in appellant's reply brief (case 2232), pages 39 to 42, heretofore filed with the court, and where it will be seen that the Supreme Court says:

> "It is manifest, therefore, that it was not meant "to decide that only pioneer patents are entitled to "invoke the doctrine of equivalents, but that it "was decided that the range of equivalents de- "pends upon and varies with the degree of in- "vention."

This rule then virtually means that a patent shall be so construed as to give the owner thereof the real

monopoly of the invention produced by the inventor, and that so broad a construction or interpretation is to be placed upon the claim or claims as is commensurate with his invention and will give to the owner of the patent that monopoly. It is thus seen that the necessity of determining an alleged invention to be a pioneer invention is obviated.

The law of this case is that the Robert Strain invention in issue is and was "substantial and important and "is therefore entitled to a fair range of equivalents." This is *res adjudicata* between the parties and binding upon this court, and the only question for the court to determine is one of fact, to-wit: Has the alleged infringing device (the new or modified type of Parker machine) identically the same, or has it the equivalent, roller side of the fruit runway; or is the roller side of the runway totally distinct from the Robert Strain invention? If such roller side of such new type or modified Parker machine embodies Robert Strain's inventive idea, then it is clear that it is an infringement. These observations bring us naturally to a consideration of what is meant by "equivalent" and the court is then thrown to a consideration of the "doctrine of equivalents" in patent law. This doctrine is not a new one, and is one of the best settled doctrines of patent law. An equivalent in patent law is

> "A thing which performs the same function, "and performs that function in substantially the "same manner, as the thing of which it is alleged "to be an equivalent."
>
> Walker on Patents, 4th Ed., Sec. 354, p. 312.

"No substitution of an equivalent, for any in-
"gredient of a combination covered by any claim
"of a patent, can avert a charge of infringement
"of that claim."

Walker on Patents, 4th Ed, Sec. 350, page 308, and cases cited.

"Combination patents would generally be value-
"less in the absence of a right to equivalents, for
"few combinations now exist, or can hereafter be
"made, which do not contain at least one element,
"an efficient substitute for which could readily be
"suggested by any person skilled in the particular
"art."

Walker on Patents, 4th Ed., Sec. 350, p. 308.

When it is said that an equivalent must perform substantially the same function and in substantially the same manner as the part for which it is substituted this must be taken with the qualification that the office of the equivalent so substituted must be the same. The identical mode of operation of the particular equivalent *per se* need not necessarily be identical or substantially the same. Each mechanical element necessarily will perform its particular function or contribute its own mode of operation, although it may make little or no difference in the general combination. As an example of this, a screw always performs its function in a substantially different manner or way from a lever and in substantially the same way as a wedge. Screws and wedges are equally inclined planes, while a lever is an entirely different elementary power. But screws and levers can be practically substituted for each other

in a larger number of machines than screws and wedges can be similarly substituted, and while a lever and a screw can be interchanged and still perform the same function with a result that is beneficially the same, they are said to perform the same function in substantially the same way.

Walker on Patents, 4th Ed., Sec. 353, p 310;
Gordon v. Warden, 150 U. S. 52.

Levers and springs are also used interchangeably in the arts, and constitute another example of equivalency.

Gould Coupler Co. v. Pratt, 70 Fed. 627.

In one case the Supreme Court decided that a confined volume of water in a cylinder worked by a pump and working a piston was the equivalent of a vibrating arm, toggle joint, and other mechanical devices, when used to transmit vibratory power.

Blake v. Robertson, 94 U. S. 732.

These equivalents and references show us that the test of equivalency is: does the combination of the patent and the combination alleged to infringe the patent do substantially the same work or perform substantially the same office and in substantially the same manner? In other words, is the inventive idea produced by the inventor copied? If it is, infringement is made out.

The two machines inspected by the master at the Riverside Heights Orange Growers' Association Packing House illustrate most forcibly that the modifica-

tions made by the defendant Parker in the machines manufactured and sold since the entry of the interlocutory decree, and since the service of the writ of injunction on defendants, and the changes made in prior machines, are simply a colorable modification of the machine of the Parker patent held by this court to infringe. The inquiry as to whether such modified machines infringe either claim one or claim ten of the Strain reissue patent is thereby much simplified. This is emphasized by reflecting that no change whatever has been made in the machine *except in one side of the grade-way.* All the other elements remain the same as in the so-called "Parker patent" construction held to be an infringement, and it is not necessary to pay any particular attention to any of such other elements, or to the relation of such other elements to each other. The issue of infringement submitted for the determination of the master was, therefore, extremely simple,—it may be stated thus:

Do the new or modified forms of machine contain the essence of the Robert Strain invention as defined and found by this court?

This court found that the Strain invention existed in "the combination with a traveling belt (common to "the Ish, Strain, and Parker machines) of a series of "independent rotating units arranged in longitudinal "succession parallel with the belt, each transversely ad-"justable."

The question of mechanical equivalency as usual enters into this question so submitted for the determination of the master and the fact to be found by the

master was: Do the several rollers of the modified Parker machine perform substantially the same function in substantially the same manner as in the Robert Strain invention or in the machine of the Parker patent? In answering this question it is to be borne in mind that the object of the Strain invention was to secure an individual control of each grading opening without affecting the next preceding or next succeeding grading opening. If this result is secured to an operative degree for fruit packing purposes in the modified forms of the Parker machines it is immaterial what effect such control or adjustment of the respective rollers may have on a portion thereof or a portion of an adjacent roller, *which does not in the operation of the machine form a part of a grading opening.*

In other words, the *sine qua non* of the Strain invention is the adjustment of the grading openings independent of the effect upon the adjacent grade openings. In the device of the Strain patent this is accomplished by a movement of the rollers toward or away from the traveling belt,—in other words, transversely of the longitudinal extension of such belt. In the Strain machine the grading opening is formed at the *front or approach end* of the roller and the *effective adjustment* or *control* of the grading opening formed is *by the adjustment at this end* of the roller. This is, of course, true of the rollers in both forms of the Parker modified machines and for the same purpose, and in practically identically the same manner.

In the modified form of the Parker machine the grading opening is formed at the initial or forward

end of the roller and between such portion of the roller and the longitudinally traveling conveying belt. Adjusting this end or portion of the roller transversely with respect to the belt (that is, toward or away from the belt) varies the grading opening and the size of fruit which can be discharged there through in the same manner in the device of the Strain reissue patent as in the device of the Parker patent. With the conical roller form of Parker grader the big end tapers the opening down or closes the opening between the roller and belt and prevents the rear end of the roller from forming an operative grading opening or space, being in this respect identical in function and effect with the overlapping guide arms of the machine of the Parker patent in that the rear end of each roller portion forms an idle or non-grading space in function and effect the same as the idle or non-grading spaces formed by the overlapping guide arms of the Parker machine. (It is doubtless unnecessary to point out in this connection that we are not in any manner concerned with the added function of the overlapping guide arms of the machine of the Parker patent, which added function was longitudinal adjustability lengthwise of the traveling belt. If the presence of such added function did not prevent the device of the Parker patent from infringing the elimination of such function of longitudinal extensibility cannot be material, as it simply brings the infringing device more closely to the device of the Strain patent.) As brought out in the testimony of complainant and Mr. Knight [Tr. pp. 140-148; Q. 123-126, p. 151; pp. 111-118], and

as demonstrated by observation of the machines at the Riverside Heights Orange Growers' Packing House, slight adjustment of this forward or initial end of a roller does not operatively affect the grading opening formed by the forward or initial end of the roller (and belt) next preceding or succeeding. In this connection it is to be borne in mind that the object of the individual adjustment is to increase slightly the size of the oranges of a given grade when they are not running quite large enough to give an even pack of a given size. In other words, as the difference in a "grading" size is only an eighth of an inch, this adjustment in any case could not reach as much as an eighth of an inch without an entire change of a grade or size, and ordinarily an adjustment of a half size or less than a sixteenth of an inch will bring the pack up even and uniform. This is brought out clearly in the testimony of Mr. Stebler. It is to be further noted that when the conical form of roller is used with the big end of the roller at the rear or away from the incoming fruit, the aperture or opening between the belt and each conical section of roller or each roller is diminishing in size as the fruit approaches the rear end of the roller. The sizing aperture is arranged at the forward end and it is clear, therefore, that the portion of the roller towards the rear forms no part of the grade opening.

In the second form of modified Parker machine the rollers are all of the same diameter, corresponding in this respect to the drawings of the Strain reissue patent. A filler stick or stationary arm (similar in function to the overlapping guide arms of the machine of

the Parker patent in that the portion covered by the stationary arms is idle or non-grading space) is used to block out any grading function for the rear end or rear half or three-fourths of the roller, and, like the conical roller form, the grading opening is formed solely at the front end of the roller and the rear portion of the roller performs no part in grading and does not in any sense form a part of the grading opening. The adjustment of this idle end of the roller does not operatively affect the grading opening formed by the forward or initial end of the roller and the belt. These two forms of Parker machines are equivalent in function and effect and are equivalent in mode of operation, function, and effect of the grade-way and members of the Strain reissue patent. The inventive idea of the Robert Strain patent is present in both these forms of Parker machine, and both of these forms of the Parker machine differ from the old Ish or California grader in the same distinct feature which formed the essence of the Strain invention as construed by the Circuit Court of Appeals.

When this case was argued before His Honor, Judge Olin Wellborn, the defendants contended that neither claim one nor claim ten of the patent in suit were infringed, because in the device of the Parker patent the rolls, taken in connection with the non-movable groove guide or belt, did not form a complete fruit runway, but were spaced apart by these overlapping guide arms, and that claims one and ten were limited to a roller side fruit runway. Complainant refers to this contention of defendants simply as illustrating how much

more closely the new modified forms of the Parker grader approach the Robert Strain conception of a grader than did the machine of the Parker patent as construed by Mr. Parker. In both of the types of modified form of Parker graders the entire runway is composed of the non-movable groove guide or belt on the one side and the series of end-to-end rollers on the other.

But defendants say:

"The new grader of the defendant is a backward "step in the art, being as it is the California grader."

Logic teaches us that any conclusion based on a false premise must be erroneous. It was demonstrated at the Riverside Heights Orange Growers' Association's Packing House and carefully brought out in the testimony of Mr. Knight and Mr. Stebler, that individual and independent adjustment of each grading opening is secured in these new machines by adjustment of the given roller section toward (transversely of) the belt. It was proven by the record and found by this court that this independent or individual adjustment of the grade openings could not be secured in the device of the Ish patent or the California grader.

Inasmuch as these modified Parker or new style graders secure this independent or individual adjustment of the several grade openings they must be something other than,—more than, and different inherently from the California grader. This fact alone is sufficient to disprove defendants' statement that they are the California grader and proves that the very premise of defendants' argument of non-infringement is wrong.

Therefore, let us in our reasoning and in our consideration of these modified Parker graders start right.

Defendants' counsel makes the erroneous claim that the new type or modified Parker machines were similar to the old Ish or California grader, and that to sustain the finding of the master that these new type Parker machines were an infringement of the patent in suit was to enjoin the defendants from making or using the old California grader. This contention is utterly fallacious. There is not even a pretense on this record that the new type or modified Parker machines do not embody the inventive idea produced by Robert Strain, to-wit, the individual or independent control of each grading opening or discharge opening independent of the adjacent grade opening or discharge opening. There is no pretense in this case that such a result could be accomplished in the old Ish or California grader. The defendants may make, may sell, may use all the old Ish or California graders that they desire without any complaint on the part of this complainant. But they cannot and they may not embody in a machine the inventive idea of Robert Strain, shown to them for the first time by Robert Strain, and pretend that such new machine is an old Ish or California grader. The decision of this court has defined what the old Ish or California grader is, and it is clear that this independent control by the operator at his will of each grading opening, or sizing or discharge opening independent of the adjacent grading opening or discharge opening was a novelty which was the thing that stamped Robert Strain's machine as an in-

vention and its appropriation by the defendants is not the use by them of the old California or Ish grader, but the wrongful and unlawful appropriation of the patented invention.

The decision of this court is, and the proofs show, that Robert Strain's inventive idea was the individual adjustment of the several grade openings without affecting the adjacent grader openings. See complainant's opening and reply briefs in this court in case 2232.

Before the special master, referring to Robert Strain's invention, defendants contended that: "The "grader differed from the grader of the prior art by "the employment of *independent* rotating and inde- "pendently transversely adjustable *units.*" To this statement if defendants will add "power driven" before "rotating" we will have their contention as made before, and denied by, this court. Complainant contended that "roller" and "rotating" as used in the claims embraced or required only capability of moving on an axis. Defendants contended that mechanical means must be employed to cause such rotation and that the grader of the Parker patent did not infringe, as the rollers were not mechanically rotated. The distinction which defendants would now draw is that instead of each roller section being *independently driven* by mechanical means, the entire roller side is driven by a single means. Complainant's present contention is that the peculiar mounting and spacing of the several rollers forming the roller side of the fruit runway in the new type or modified forms of the Parker grader is the

full mechanical equivalent of the particular construction shown in Robert Strain's drawing, for the reason that the parts co-operate in substantially the same manner to produce substantially the same result, therefore, that Strain's inventive idea has been embodied in the modified machines in which, by adjusting a roller transversely toward or away from the belt the grade-opening formed at the approach or forward end of such roller and between such roller and the belt is controlled or varied without operatively affecting any adjacent grade opening. This cannot be accomplished in the California grader, but defendants say that the modified forms of Parker machines are the California grader. In one sense this is true, to-wit, by adding to such statement that they are the California grader *with Robert Strain's inventive idea added thereto and incorporated therein,*—that is, the individual adjustment of the grade openings without operatively affecting the adjacent grade openings. In this sense the statement is also true of the grader of the Robert Strain patent. This observation means nothing more than that the modified Parker graders are no more the California grader than is the Robert Strain grader; that both embody the Robert Strain invention and inventive idea and demonstrate conclusively that defendants are in error in their statement that the modified Parker machines are the California grader.

In connection with the statement just quoted from defendant's brief, reference is made by defendants to what is termed in such brief the California grader at the Rialto Packing House. Complainant understood

that evidence to this grader was admitted by the master solely as showing a machine which was open to the defendant Riverside Heights Orange Growers' Association to have used and to form a basis of comparison from which to draw a conclusion of the profits derived from the *use of the infringing machines.* It is clear that such evidence is incompetent and inadmissible in this case for any other purpose. It is a matter which has been closed prior to the reference to the master. The master may not receive additional evidence of the state of the prior art. But there is still another more cogent reason for not considering this particular Rialto grader, in the fact that the evidence shows it was not built or constructed until many years after the application for patent in suit and until after the actual issuance of the patent in suit. It is not a part of the "prior art" and there is not one scintilla of evidence in the remotest degree tending to prove that such a construction of grader was known or used prior to the Robert Strain invention. In fact, this Rialto machine is a machine which was built with full knowledge of Robert Strain's invention and of the devices embodying such Robert Strain invention. It is a modification of the Ish or California grader, made *not with the knowledge* of the art as it existed *prior* to Robert Strain's invention, but in view of and *after* full knowledge of the Robert Strain invention. No such machine ever existed prior to Robert Strain's invention.

It must be obvious to the court that two constructions of the roller side of the runway of one of these

fruit graders or sizers are equivalents of each other when they produce precisely the same result and secure that result in precisely the same manner. This is true of the device of the Robert Strain patent and of both of the new types of modified Parker grader. The sizing opening or discharge or grading opening is formed between the belt and the roller. The size of this opening is controllable by adjustment by the operator, and at his will, without affecting the adjacent sizing or grading opening. Not only is this true, but this control is secured in precisely the same manner. The mechanical adjustment control devices are slightly different. They are different only in degree and only in detail. The claims in suit do not call for, and are not limited to the details of such adjustment device. This is clear from the decision of this court. The two runways thus formed are fully equivalent and the roller side of each is the full equivalent of the other, and the manner of forming and adjusting the grade opening is the full equivalent of the other. In each the operative or effective grading opening is formed at the initial or forward end of the roller section and the rear end portion, or, to be more precise, the two-thirds of the roller away from the feed end performs no function in grading. This is true in both the machines of the Robert Strain patent and the modified Parker type of machines.

It is submitted that not only are the findings of the master supported by the evidence, but they are unquestionably correct.

An attempt has been made to criticise the findings of the master as set forth on page 287 of the Transcript of Record and the findings set forth on page 5 as inconsistent. This criticism, when the subject-matter of such findings is understood, is readily seen to be fallacious and incorrect. On page 3 the master finds that the modified machines are made up of a "series "of independent rotating units." In this sense he is referring to the fact that they are independent in their adjustment, forming the effective grade opening or discharge opening. He is not referring to the fact that they rotate as one piece. On page 289 the master goes more into detail and says (last two lines page 289) that they "are not independently rotatable" and "are "not independently adjustable with respect to each "other." In this respect the master means that each roller section in the new type or modified type of Parker machine is not mechanically controlled independent of the adjacent roller section either as to rotation or as to adjustment, but neither of these is required to embrace or embody the Robert Strain invention. Robert Strain's invention was not independence in that mechanical means either as to rotation or adjustment. Robert Strain was not making an invention in either rotating devices or adjusting devices. He was an improver in a combination, and that combination was, as stated by our Circuit Court of Appeals, a "traveling belt (common to the Ish patent and Parker "machines) and a series of independent rotating units "arranged in longitudinal succession parallel with the "belt, each transversely adjustable." As we have al-

ready stated, it makes no difference in the machine whether the rollers or roller sections rotate in synchronism or at different speeds and independently, and that which the Court of Appeals intended to emphasize by the term "independent" and by the term "transversely adjustable" in its opinion must necessarily refer to the independent adjustability of the operative portion of the machine, to-wit, the portion forming the grading opening or discharge opening. This portion is the forward or initial one-third of each roller section. Adjusting this end of such section varies the size of the orange discharged between the belt and the roller. This is true in the Robert Strain machine and true in the defendants' machines, and when reference is thus made to the defendants' machine we mean not simply the new or modified type of Parker grader, but also the device of the Parker patent and in the same sense.

Complainant's position before the court now is the same as it has always been in this case, but the defendants' contentions are confusing. The question really for the master to determine was, by adjustment within the control of the operator could the operator adjust each grade opening or discharge opening separately without affecting the adjacent discharge opening or grading opening? This is a question of fact, and the master has found that this can be accomplished, and accomplished in practical manner, in the new type or modified Parker machine. So finding this fact the question of infringement was determined and must be determined in favor of complainant's conten-

tion because this is the essence of the Strain invention. It is the inventive idea expressed by the Strain patent.

As said in Eck v. Kutz, 152 Fed. 758:

> "The question is whether the inventive idea ex-
> "pressed in the patent has been appropriated; and,
> "if it has, infringement has been made out."

As said in Brown Bag Filling Machine Co. v. Drohen, 140 Fed. 97-100:

> "A device which is constructed on the same prin-
> "ciple, which has the same mode of operation, and
> "which accomplishes the same result as another
> "by the same or by equivalent mechanical means,
> "is the same device, and a claim in a patent of one
> "such device claims and secures the other. Citing
> "Machine Co. v. Murphy, 97 U. S. 120-125."

In Ide v. Trorlicht Co., 115 Fed. 137, it is said:

> "Mere changes in the form of a device, or of
> "some of the mechanical elements of a combina-
> "tion, will not avoid infringement, where the prin-
> "ciple or mode of operation of the invention is
> "adopted. except in those rare cases in which the
> "form of the improvement, or of the element
> "changed is the distinguishing character of the in-
> "vention."

As said by Circuit Judge Nelson in Blanchard v. Beers, 2 Blatch. 416:

> "The sure test, and one the jury should be
> "guided by in all cases of this kind, is whether or
> "not the defendant's machine, whatever may be its
> "form or mechanical construction, has incorpo-
> "rated within it the principle, or the combination,

"or the novel ideas which constitute the improve-
"ment to be found in the plaintiff's machine."

As said by this court in Norton v. Jensen, 49 Fed. 859-866:

"It is well settled that a copy of the principle or "mode of operation described in the prior patent "is an infringement of it. If the patentee's ideas "are found in the construction and arrangement "of the subsequent device, no matter what may be "its form, shape, or appearance, the parties making "or using it are deemed appropriators of the pat-"ented invention, and are infringers. An infringe-"ment takes place whenever a party avails himself "of the invention of the patentee without such a "variation as constitutes a new discovery."

As said by Judge Nelson in Tatham v. Le Roy, 2 Blatch. 486:

"Formal changes are nothing—mere mechanical "changes are nothing; all these may be made out-"side of the description to be found in the patent, "and yet the machine, after it has been thus "changed in its construction, is still the machine "of the patentee, because it contains his invention, "the fruits of his mind, and embodies the discov-"ery which he has brought into existence and put "into practical operation."

In the case of Detroit Copper Mining Co. v. Mine & Smelter Co., 215 Fed. 103, this court said:

"When the whole substance of the invention "may be copied in a different form, it is the duty "of courts and juries to look through the form for "the substance of the invention. Winans v. Den-

"mead, 15 Howard 330; Metallic Extraction Co. "v. Brown, 104 Fed. 345, 43 C. C. A. 568; Ben- "bow-Brammer Mfg. Co. v. Simpson Mfg. Co. (C. "C.), 132 Fed. 614."

In Los Angeles Art Organ Co. v. Aeolian Co., 143 Fed. 887, this court said:

"In passing upon the issue of infringement, the "question to be determined is whether, under a "variation of form or by the use of a thing which "bears a different name, the defendant accom- "plished by his machine the same purpose or effect "as that accomplished by the patentee, or whether "there is a real change of structure or purpose. If "the change introduced by the defendant consti- "tutes a mechanical equivalent in reference to the "means used by the patentee, and if, besides being "an equivalent, it accomplishes something useful "beyond the effect or purpose accomplished by the "patentee, it will still be an infringement as re- "spects what is covered by the patent, although the "further advantage may be a patentable subject as "an improvement on the former invention."

See, also:

Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935;

Cantrell v. Wallick, 117 U. S. 689, 694, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017.

In Blandy v. Griffith, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1529, the court said:

"As long as the root of the original conception "remains in its completeness, the outgrowth— "whatever shape it may take—belongs to him with "whom the conception originated."

In Walker on Patents, Sec. 376, the author said:

"On the other hand, a defendant's machine may "be better than that covered by the patent in suit; "but if that superiority resulted from some addi- "tion to the latter, it will have no tendency to "avoid infringement."

In Robinson on Patents, Sec. 30, the author said:

"To the patentee belongs not merely the ex- "clusive right to what he has invented, but also the "right to prevent others from using their own in- "ventions, however valuable they may be, if they "embrace a single one of his original ideas."

In Curtiss on Patents, Sec. 320, the author, in discussing this question, said:

"The substantial identity, therefore, that is to "be looked to, in cases of this kind, respects that "which constitutes the essence of the invention, "viz., the application of the principle. If the mode "of carrying the same principle into effect adopted "by the defendant, still shows only that the prin- "ciple admits of the same application, in a variety "of forms, or by a variety of apparatus, the jury "will be authorized to treat such mode as a piracy "of the original invention."

See, also:

Kings Co. R. F. Co. v. U. S Con. S. R. Co., 182 Fed. 59 (C. C. A. 9th Cir.).

"The object of the patent law is to secure to in- "ventors a monopoly of what they have actually "invented or discovered, and it ought not to be "defeated by a too strict and technical adherence

"to the letter of the statute or by the application "of artificial rules of interpretation."

Topliff v. Topliff, 145 U. S. 156.

In Hobbs v. Beach, 180 U. S. 383, it is also said by the Supreme Court:

"If there be one central controlling purpose de- "ducible from all these decisions, and many more "that might be quoted, it is the steadfast determi- "nation of the court to protect and reward the "man who has done something which has actually "advanced the condition of mankind, something by "which the work of the world is done better and "more expeditiously than it was before."

In this case defendants' entire argument is based upon the contention that what they are using is the Ish or California grader of the prior art, yet, as we have pointed out, defendants' modified or new type machines embody the Strain inventive idea. If defendants had manufactured the old California grader complainant would not be complaining. The Supreme Court of the United States has expressed this very aptly in

Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 444:

"It gives the tribute of its praise to the prior "art; it gives the Grant tire the tribute of its imi- "tation, as others have done."

Here the siren's song of the defendants is the California grader. They cannot praise that grader too greatly. Nevertheless they use the Strain grader. The

reason is apparent, they must use the Strain invention. The master was undoubtedly correct in his finding of fact that the new type or modified Parker grader infringed.

It was the duty of the special master to determine by the accounting "all of the infringing acts down to "the time of filing his report." "If the defendant has "made machines of changed construction he should re-"port as to them."

Hopkins on Patents, Sec. 413, p. 584.

Walker on Patents, 4th Ed., Sec. 742, p. 577, says:

"The extent of the defendant's infringement "must be determined by the master in order to "enable him to ascertain the amount of the profits "which the defendant derived from that infringe-"ment. Where the infringement was all alike, or "where the interlocutory decree specifies the par-"ticular doings of the defendant which are to be "accounted for as infringements, the only question "for the master to decide on this point is a ques-"tion of quantity. But where the interlocutory de-"cree merely directs the master to take and report "an account of the profits which the defendant de-"rived from infringing the complainant's patent, "and where the complainant claims that certain "doings of the defendant which were not proved "prior to the interlocutory decree, constitute such "an infringement, it becomes the duty of the mas-"ter to decide the question of infringement in-"volved."

Knox v. Quicksilver Mining Co., 6 Sawyer 436;

Ball Glove Fastening Co. v. Soxket Fastening Co., 53 F. R. 245;

Fenton Metallic Co. v. Office Specialty Co., 12 App. D. C. 221;

Hoe v. Scott, 87 F. R. 220.

The case of Hoe v. Scott is one of the leading cases on this subject and the decision therein and the text just quoted of Walker on Patents is cited with approval by the Circuit Court of Appeals of the First Circuit in

L. S. Starrett Co. v. Brown & Sharpe Mfg. Co., 208 Fed. 887-893.

"The question whether a defendant, after an "interlocutory decree finding infringement of a "patent, further infringed by the use of machines "not before the court, is one that may properly be "determined by the master on accounting."

Brown Bag Filling Co. v. Drohen, 171 Fed. 438, citing:

Wooster v. Thornton, 26 Fed. 274;

Westinghouse Co. v. Sangame Co., 128 Fed. 747;

Edison Co. v. Westinghouse Co., 54 Fed. 504.

See, also:

Thomas v. Electric Porcelain Co., 114 Fed. 407;

Hanifen v. Armitage, 117 Fed. 845-851;

Walker Patent Pivoted Bin Co. v. Miller, 146 Fed. 249-251;

Adams v. Keystone Mfg. Co., 41 Fed. 596.

The question whether the master should determine whether the modified Parker machines or new type

machines are infringements is not open for the master to determine. This matter has been determined by the decision of His Honor Judge Wellborn on the motion to enjoin the prosecution of the suits against the users. Judge Wellborn's decision will be found reported in

> Stebler v. Riverside Heights Orange Growers' Association, 211 Fed. 985.

Judge Wellborn's first proposition being that

> "The master has full authority to inquire into "and find all acts of infringement by either party, "and to award profits and damages for all such "infringing acts. Robinson on Patents, § 1153 and "note cited; Tathom v. Lowber, 4 Blatch. 86, 23 "Fed. Cases 722, No. 13765."

This decision was affirmed by this court. See 214 Fed. 550.

It would seem so elementary as not to require the citation of authorities,—that the master is bound by the decision of the Court of Appeals as to the scope of the claims and by the state of the art as found by such Court of Appeals. The validity of claims 1 and 10 and their scope is *res adjudicata*. It is the duty of the master to follow the interpretation given by the Circuit Court of Appeals, and certainly he cannot follow that interpretation if he receives additional evidence as to the state of the prior art. Further, matters which are not a part of the prior art could not have any bearing upon the scope of the claims of the patent in suit. In this case complainant insists that

no evidence is admissible before the master to show any different state of the prior art than that shown in the record upon which the interlocutory decree is based.

In

Murray v. Orr, 153 Fed. 369,

the Circuit Court of Appeals for the Seventh Circuit holds that the master cannot review the decree or inquire into the prior state of the art. In this opinion the court says:

> "It was not open to defendants on the question "of additional infringements to refer to the prior "art to limit the scope of the invention to less "than we have found it to be in determining the "infringement of the Columbia ladder."

In passing, therefore, the question as to the duty of the master to examine and determine this alleged subsequent infringement by the modified or new style Parker machine, complainant calls attention to the fact that the injunction secured by the defendant Parker enjoined the complainant from bringing any suit against any user or infringer of the Strain reissue patent. If, in accordance with Judge Wellborn's opinion, it is not the duty of the master to determine all infringing acts of the defendant Parker, complainant would be without any remedy whatever. Clearly if it were necessary to file a supplemental bill or an independent suit no injunction would have been issued to have prevented complainant's taking such action in such form as complainant should elect.

What materiality or relevancy the so-called new style California grader at the Rialto Packing House has upon the question of the scope of the claims under consideration is not apparent. How a construction which was not known and which had never been used prior to the date of the Robert Strain invention and which is and was not a part of the art prior to the Robert Strain invention can affect in any manner the question of infringement or the scope or interpretation to be given to the claims is not apparent. Clearly something that did not exist until after Robert Strain's invention cannot be held to be a part of the art prior to Robert Strain's invention and to have been known prior thereto. But in this connection it should be borne in mind that the individual control or adjustment of the grade openings without affecting operatively the adjacent grade opening or openings cannot be secured in this Rialto machine, and this is admitted and stipulated by the defendants and is borne out by an inspection of such machine, defendants apparently seek to try and determine the issues of equity suit A-92 with regard to a totally different construction and interrelation of parts of a grader and distributing system than that involved in the Parker modified machines or new type machines shown to the master. In such equity suit A-92 there is involved the adjusting trapdoor arrangement beneath the traveling belt, which arrangement was an infringement of the Thomas Strain patent number 775,015 and of the movable leaves by means of which independent adjustment was secured by raising or lowering the belt toward the roller, this being the

direct opposite of adjusting the roller toward the belt, and Mr. Knight is correct in stating that in this type of machine where the rollers are mounted, as in the Pasadena Orange Growers' Association machine, in sections upon brackets and rotated from one end, such series of rollers constitute in their operative effect a single roller for the length of the machine. It must be borne in mind that in that machine also this single roller thus formed was mounted at an inclination to the traveling belt. In other words, one end of this series of rolls was further away from the belt than the other end and in the same manner as specified in regard to the grading rod of the Thomas Strain patent. It is thus seen that the defendants seek to confuse rather than clarify the issues presented to the master. But there is another aspect of defendants' contention: If the series of rollers, each roller being smaller in diameter than the preceding roller, in the Rialto machine be considered as a single roller for the length of the machine, no provision is made therein for individual adjustment for the reason that each roller has the same diameter for its entire length and there are no arms or sticks blocking out the rear portion of the opening formed between such roller and the belt so that the effect of adjusting is diametrically the opposite to the effect of adjusting in either of the modified Parker machines. In the Rialto machine any adjustment affects at least two grade openings, and this is the meaning of the stipulation that an individual adjustment cannot be secured in the Rialto machine. In the form of modified Parker machine in which the rollers have

the same diameter from end to end it is necessary to provide the guide arms of the Parker patent to block out a portion of the opening between such roller and belt to form an idle or non-grading space in order to effect the individual adjustment without affecting the adjustment of the adjacent roller, thus showing the embodiment of the same feature in this form of modified Parker machine that was held to be an infringement by this court in its decision, 205 Fed. 735. In the Rialto machine no such guide arms were ever used. The fact that Mr. Stebler collected a royalty on account of this Rialto machine and licensed its use under the Ish patent is not determinative of any of the issues of this case. Mr. Stebler likewise collected many hundreds of dollars royalties from the manufacturers and users of machines like the Robert Strain machine and collected these royalties under such Ish patent and issued such licenses under said Ish patent. This license question is another interjection of defendants into this case which simply befogs the issues and does not present any matter which is determinative thereof.

In referring to the new type or modified form of Parker grader defendants say:

"It has, in common with the California grader, a "series of end to end connected rollers, all of said "rollers being driven in unison, and the ends of ad- "jacent rollers are supported by a common adjustable "bearing support."

This reference to the California grader is erroneous. There is not a word of testimony in the record to sup-

port it. The testimony in the record does show that the California grader was made up of two and possibly three sections of roller, all connected together, to be driven in unison, the abutting sections supported by a common adjustable bearing support, but this statement disregards the vital essence of the California grader or Ish patent construction as found by this court and as shown by the testimony, to-wit, that never prior to Robert Strain's invention had a grader been made in which the roller side of the runway was formed of roller sections, each roller section having a single diameter its whole length. On the contrary, each of the sections composing the roller side of the runway in the California grader used prior to the Robert Strain invention were provided with at least two steps, so that the Rialto machine does not correspond with any of the California graders of the art prior to Robert Strain's invention. This is the finding of this circuit on the evidence adduced which is determinative of these issues and *res adjudicata* between the parties. Of course, if the statement just quoted from defendants is intended to refer to the Rialto machine (which defendants call a California grader), then the statement just quoted is true, but we have nothing whatever to do with such Rialto machine. It is not a part of the prior art and it cannot be considered for the purpose of limiting the claims or the scope of the claims. Such questions are *res adjudicata* between the parties, and even if not *res adjudicata,* the features referred to in this statement might be common in five hundred different graders. It is, however, begging the issue to

compare two devices, one of which will perform a given function in a given manner and the other which cannot perform such function. The Parker modified machines as exhibited to the master have the individual control of each grade opening without operatively affecting the adjacent grade opening. Defendants concede that this Rialto machine does not have this feature. This court has found that no California grader had this feature, therefore, the comparison made by defendants is immaterial.

Complainant's question is: Why do defendants compare their modified Parker or new type machine with a construction which was not in existence or known until years after the Robert Strain invention, instead of comparing the same with the California grader as it was proven to have existed, to have been manufactured, and to have been used prior to Robert Strain's invention?

Nothing was ever more significant in a law suit. The action of defendants is an admission that the prior art as determined by this court, and as proven in the record upon which the interlocutory decree under which the master acted was based, does not show anything comparable with the modified Parker machines or new type graders.

If it were proper to compare the Rialto machine (erroneously called by defendants the California grader) with either of the modified Parker graders, it is seen that with such Rialto machine the adjustment of any of the supporting means affects the position of two adjacent rollers while the adjustment of two com-

panion adjustable means or bearing supports varies the position of three of the rollers, and thus coincidently changes two, or in the latter case three, different grades. In this Rialto machine there are no devices used corresponding to the guide arms or filler sticks of the grader of the Parker patent which are necessary in the cylindrical roller type of modified Parker machine in order to secure the individual adjustment of the grade openings without operatively affecting the adjacent grade opening or openings. The portion of the roll in this particular type of Parker machine thus blocked out by such guide arm or filler stick is a mere idle or non-grading space in the same relation as in the case of the overlapping guide arms or filler sticks of the device of the Parker patent and differs radically in function and effect from anything in the Rialto machine.

Defendants have made many references to the fact that in the modified Parker machines the several rollers are not "independently rotatable with respect to each "other." These references are not understood. This court, in construing the claims in issue, has not held that they were limited to being independently rotatable or independently rotated, and there is no difference, so far as performing their functions as a part of the grade-way or in forming the grade openings, whether they are indepently or coincidently rotatable or rotated. This feature does not enter into the case in any manner.

The following facts have been established by the decision of this court, are *res adjudicata* between the parties, and were not subject to review by the master:

1. The "Ish" or "California" grader or sizer did not contain such an arrangement of elements as enabled the independent or individual control or adjustment of a given grade-opening or discharge opening without coincidently changing an adjacent grade or discharge opening.

2. That Robert Strain was the first to conceive the individual or independent control or adjustment of respective grade openings or sizing apertures without affecting adjacent grade openings or apertures. This was his "inventive idea" (*Eck v. Kutz, supra*), and this is what his patent covers.

3. That no "Ish" or "California" grader had ever been known, made, or used (*prior to Robert Strain's invention*) with a separate roller or roller section for each grade. That by using an individual or separate roller for each grade a decided and distinctive result is secured. This is a result and a mode of operation not securable in any "Ish" or "California" grader known, made, or used prior to Robert Strain's invention. By this individual adjustment or control of the grade openings or grading apertures is rendered possible that the "Rialto" grader (inspected by the master) does not embody the "Ish" or "California" construction of the art prior to Robert Strain's invention.

4. That Robert Strain's invention was "substantial "and important" and not a mere improvement in detail of mechanisms.

5. That the manner of rotation of the separate or individual or independent rollers or roller sections is immaterial. They may be power driven or not. Either will embody the Robert Strain invention.

6. That the "independence" of the rollers or roller sections is an "independence" as regards the control or adjustment of the apertures through which the fruit is discharged and thereby separated according to size. Therefore, the *sine qua non* of such "independence" is solely the movement of each roller or roller section toward or away from the belt in such manner as to effectively control the size of fruit which will pass out at a given roller or roller section. Only so much of the roller is involved in this as forms part of the actual discharge portion. Any slight movement not effecting a change in the size of fruit discharged at an adjacent discharge portion or aperture does not affect the result nor the idea of means nor change the real character of the machine.

7. That the new style or modified Parker graders are not "Ish" or "California" graders, for the reason that they embody the separate, individual, and independent control of the discharge apertures or grade openings by adjustment of the respective rollers or roller sections without affecting the size of fruit discharged by an adjacent grade opening or aperture.

8. That the prohibition (by the injunction in this case) of the further making, use, or sale of the so-called new type or modified Parker graders does not interfere with the right of any one to make, use, or sell the "Ish" or "California" grader (in which no indi-

vidual or independent adjustment of each grade discharge is possible without affecting an adjoining grade discharge).

The master found that the new type or modified Parker graders were a closer imitation of the particular embodiment of the Strain invention than the Parker patent type. This finding is correct. The entire wall of the runway in the new type is of rollers. This conforms to the exact letter of the claims, while the overlapping guide arms of the Parker patent type was a departure from the letter of Strain's claims.

The appellants' contention that the master erred in considering the new or modified types of graders for the reason that

> "the differences are such as to create a new ma-
> "chine, one constructed of elements working on a
> "different principle of operation from the patented
> "(Parker) device" (Appellants' Brief, p. 28),

has no foundation in fact. Nor does it ring true with appellant's contention that such graders are nothing more than the old "California" graders. Yet it is a "question of fact," which must be determined before it can be held (even under defendants' asserted rule of law) that the master erred in hearing and determining such question of fact. In other words, the rule of which defendants assert requires a finding of fact before the master considers the evidence.

The admitted history and construction of the very modified machines inspected by the master shows the correctness of the master's proceeding. It was proven

by the testimony of complainant and defendants that the very machines against which *this* court ordered an injunction had been only *colorably modified* in an attempt to avoid such injunction. It was proven by uncontradicted testimony that no changes whatever had been made in such machines *except* in the roller side of the fruit runway, and that these changes consisted solely in substituting for the overlapping guide arms, roll-carrying brackets and rolls, a series of end-to-end rolls, the ends of the rolls closely abutting, together with adjusting brackets, etc. No other changes were made. The master held these changes were merely colorable. That in fact the modified machines more clearly infringed the terms of the claims than did the Parker patent type of machines. The master *followed* the interpretation placed on the claims and on the Strain invention by this court. He did not give the patent "an enlarged construction." On the contrary, he determined the fact to be that the modification made in the roller side of the fruit runway brought the machines more closely within and to the Strain invention and to the particular embodiment thereof shown in the patent in suit than was the Parker patent construction.

This court must first reverse the master's finding of fact,—based upon his seeing the witnesses, observing their manner, and hearing the oral testimony of the witnesses, plus *his own personal inspection and comparisons* of the machines,—before this court can accept defendants' statement that "the differences are such as to create a new machine, one constructed of elements working on a different principle of operation from the

patented (Parker) device"—and apply the rule contended for by defendants.

Clearly the procedure by the master was according to the cardinal principles of equity jurisprudence. Equity intervenes to prevent a multiplicity of suits. The master's procedure avoided additional suits. The master's procedure prevented an evasion of the decree of this court in this suit by a mere colorable change of the very machines enjoined. The Honorable Judge of the District Court agreed with the master and considered the making and sale of the modified graders a wilful infringement. On account of such further infringement in the very teeth of and in contempt of the writ of injunction, His Honor Judge Bledsoe inflicted punitive damages in the sum of $2,340.20 under sections 4919 and 4921 R. S. U. S. because these modified machines were *mere colorable evasions.*

In appellants' brief opposite page 29 there has been inserted a set of illustrations or drawings, six in number. With regard to these it is first to be noted that none of them are in evidence.

Fig. 1 of these drawings might be taken as a diagrammatic view of the particular construction described and shown in the Ish patent #458,422 considered by this court in 205 Fed. 735, although this drawing is not sufficient for a clear understanding of that device.

Fig. 2 is misleading. There is no evidence that such a machine as this was constructed *prior* to the Robert Strain invention. The modified Ish or California grader as it existed prior to the Robert Strain inven-

tion was before the court on the first appeal and considered by this court in its decision, 205 Fed. 735, and there was before the court a model illustrating such construction. The construction differed from the Ish patent as shown in the record on the first appeal and discussed in the brief. It was admitted by all the witnesses in behalf of both the parties that none of these Ish or California graders were so constructed that the operator at will could control each grade opening separately without affecting an adjacent grade opening, and this was the finding of this court.

Fig. 3 of these drawings is a showing of an installation which is not before the court. It is complainants' position that in this case all questions of the novelty of the Strain invention were fully considered and passed upon and rendered *res adjudicata* between the parties by the decision of this court in 205 Fed. 735, and it would have been error on the part of the master to have permitted the introduction of any further testimony for the purpose of limiting the scope of the claims of the patent in suit or for the purpose of putting a different interpretation thereon than the interpretation placed thereon by this court in its decision, 205 Fed. 735, under which the special master was acting. It follows, therefore, that if what is now asserted to have been this Fig. 3, or "Jameson" California sizer, differs in any respect from the showing made on behalf of the defendant when this case was heard upon the merits of the Strain patent and invention and its novelty and scope determined, then such evidence cannot properly

be brought before this court or considered by either the master, the District Court, or this court.

There comes a time in litigation when the parties are foreclosed from introducing evidence upon their defense, and it is submitted that in this litigation that time was reached when the case was heard at final hearing. The Rialto machine or the Jameson machine could only be used by the special master *as a means of comparison in determining the profits* derived by the defendant Riverside Heights Orange Growers' Association from the use of the Strain invention as having advantages over any machine or machines which were free to be used by such association. This question has been entirely eliminated from the case. as complainant has elected to abandon any claim of profits against the Riverside Heights Orange Growers' Association and asked for damages only as against that defendant.

The special master was correct in sustaining complainants' objections to the offer of further proof in regard to this Jameson machine. It was not competent for the defendant to offer further evidence of the state of the prior art for the purpose either of anticipating the Strain invention or limiting the scope thereof. (*Murray v. Orr,* 153 Fed. 369.) These matters were *res adjudicata.*

The attempt by the defendants to offer further evidence before the master in regard to the Rialto or Jameson machines upon either the question of infringement or the scope of the Strain invention was merely cumulative. The entire history of the Ish or California graders or sizers had been thoroughly thrashed

out in the final hearing of this case and fully determined by this court in its decision upon the first appeal. The Jameson machine was pleaded in defendants' answer as an anticipation and proofs were taken in regard thereto. These proofs were considered by this court upon the first appeal. The attempt of defendants to offer further evidence in regard thereto was merely an attempt to offer cumulative evidence and there had been no order made reopening the case for further consideration of any of the issues which had been determined.

The testimony of Frank Proud [Trans. Record on first appeal, page 275] shows that this "Jameson" grader was not rebuilt by Mr. Proud until after Mr. Strain's invention, and has been fully considered by this court.

It is submitted, therefore, that the new evidence attempted to be offered before the master in regard to either the Rialto or the Jameson machine must be excluded from consideration.

The deposition of Edgar R. Downs on behalf of defendants shows that this Rialto machine was not built until 1905, four years after the Strain invention by Robert Strain [Transcript of Record, pp. 106-109].

The parties stipulated that the manner of supporting and adjusting the roller side of the runway of this Rialto grader was not such as to permit in any manner the individual adjustment of separate grade openings formed by the roller surface and the belt. This is admitted on page 54 of appellant's brief. In this respect the machine corresponded to the California grader.

[Tr. p. 109; see also testimony of Mr. Knight and Mr. Stebler.]

In this connection it must be borne in mind that the new Parker sizers or modified graders held by the master to infringe, are so constructed as to embody this inventive idea produced by Robert Strain of so constructing the roller side of the runway that each grade opening may be adjusted without affecting the adjacent grade opening. Undoubtedly this Rialto machine infringed the Ish patent, and the licensing in 1905 of the Rialto machine under the Ish patent owned by complainant raises no question of such particular construction being known in 1901, the date when Robert Strain made the invention covered by the patent in suit. Thus again we find that the Rialto machine could have been material only for use in a comparison as to the profits or advantages derived by the defendant Riverside Heights Orange Growers' Association from the use of the infringing machines over the use of the machines which were open and free to it to use. That question, however, has been eliminated from the case, and the Rialto machine is therefore eliminated from the case.

However, with this "Jameson" construction no such result can be secured as is secured by the device of the Strain patent in suit, the Parker type of grader, or the modified Parker graders. It is impossible to secure any individual adjustment or control by the operator of the individual grade openings without affecting the adjacent grade or discharge opening in this "Jameson" machine.

Each of the statements of appellants' brief referring to these various machines or drawings inserted opposite page 29 of appellants' brief, i. e., like the statement on page 31 referring to the device of Figure 2 that—

> "The roller sections were mounted in bearing "brackets E, so that the roller sections could be "adjusted toward and from the fixed member A "of the fruit runway to vary the distance there "between, so as to regulate the grade outlets of "the apertures for different size fruit"

must be carefully scrutinized. The statement is true, but it is only half the truth. With the old Ish patented construction the graduated roller could be adjusted toward or away from the belt, but such adjustment effected more than one grade opening or aperture at a time, and this is true of the devices illustrated in Figs. 1, 2, 3 and 4 of the drawings of appellants' brief opposite page 29, and this essential differentiation is not referred to, but, on the contrary, ignored in appellants' discussion of the drawings. These matters have been fully determined by this court on the first appeal.

In appellants' brief the defendants have misconstrued the Strain invention. They have misconstrued the Strain reissue patent in suit. They are again insisting upon the same interpretation which they urged in this court, and which was repudiated by this court, upon the first appeal. They also misconstrue the decision of this court.

This court distinctly found that the Strain invention was not limited as claimed on pages 36 and 37 of appellant's brief. This court found that—

"While the invention is not basic or primary, it "is substantial and important, and is therefore "entitled to a fair range of equivalents." (205 Fed. 740.)

"The invention, we think, was an *important and "distinct advance* in the art." (205 Fed. 738.)

Defendants' argument on pages 36 and 37 of appellants' brief again turns on words and terms. It ignores the inventive idea produced by Robert Strain and ignores the true rule of interpretation. This portion of said brief is fully answered in appellants' briefs on the first appeal (case 2232).

As said by the Supreme Court in *Bates v. Coe* (98 U. S. 31):

"In determining about similarities and differ- "ences, courts of justice are not governed merely "by the names of things, but they look at the ma- "chines and their devices in the light of what they "do or what office or function they perform, and "how they perform it, and find that a thing is sub- "stantially the same as another, if it performs sub- "stantially the same function or office in substan- "tially the same way to obtain substantially the "same result; and that devices are substantially "different when they perform different duties in a "substantially different way, or produce substan- "tially a different result. Cahoon v. Ring, 1 Cliff. "620."

As said by this court in Los Angeles Art Organ Co. v. Aeolian Co. (143 Fed. 880, 887):

"If the change introduced by the defendant con- "stitutes a mechanical equivalent in reference to

"the means used by the patentee, and if, besides "being an equivalent, it accomplishes something "useful beyond the effect or purpose accomplished "by the patentee, it will be an infringement as re- "spects what is covered by the patent, although the "further advantage may be a patentable subject "as an improvement on the former invention."

"The range of equivalence depends upon and "varies with the degree of invention." Citation Paper Bag Co. case, 210 U. S. 405.

Defendants' argument is that the Strain invention is limited to details of construction and that the claims must receive a narrow literal construction. This is the same error into which defendants fell in their contentions before this court upon the first appeal, and this contention was rejected by this court as seen by the first paragraph on page 740 of the court's opinion in 205 Federal Reporter.

As urged by the complainant upon the first appeal, the question before the master and now before this court is "*whether the inventive idea* expressed in the patent has been appropriated, and if it has, infringement has been made out." (Eck v. Kutz, 152 Fed. 758.)

On page 40 of appellants' brief two quotations have been made from complainant's brief upon the first appeal to this court (case 22-32). The observations thus quoted refer to the *preferred* embodiment of the invention as disclosed by Mr. Strain in the drawings of the patent. It is well known that a given inventive idea may be embodied in various forms, and there was nothing in either of these statements, or in any state-

ment of the opinion of this court upon the first appeal that intended to even intimate that the Strain invention was limited to absolute independence of the rollers with respect to each other. A fair reading of complainant's briefs on the first appeal and the court's opinion will clearly demonstrate this. The "independence" referred to by this court on page 739 of its opinion is an independence in the operative adjustment of each grade opening without effecting the adjoining grade opening. This was the nub or kernel of Robert Strain's invention as set forth and claimed in complainant's briefs on the first appeal and as interpreted by the court.

On page 33 of appellants' brief we find a most amazing statement. It must be attributable to carelessness, for it certainly cannot be made with the intention of deliberately misleading the court. Yet this statement emphasizes the care which must be exercised to avoid being misled by the cuts or drawings inserted opposite page 39. We quote from page 33:

> "He (*Parker*) proceeded to place on the market "a fruit sizer constructed in all essentials like the "device of the Rialto grader."

Yet the writer of that brief has confessed or stipulated on the record and in the presence of the special master that the Rialto machine cannot be adjusted to regulate one grade opening without simultaneously and coincidently effecting an adjacent grade opening!—The very thing required in and produced by the grader construction and the interrelation of elements which Mr. Parker proceeded to make and place on the market.

Such statements in a brief naturally teach that all the statements and arguments therein contained are to be read with caution and, we might possibly say, *with suspicion.*

This same caution must be exercised in reading and analyzing the alleged comparison of the new or modified Parker graders with the so-called Jameson grader, *if that grader were before the court.*

If this court will refer to the brief filed in this court on behalf of these defendants on the first appeal in this case, this same error will be found, i. e., defendants ignore in all their comparison the question of individual or independent adjustment of the grade openings without affecting adjacent grade openings This was Robert Strain's invention as found by this court. It is admitted it is wanting in the Ish or California graders, including the so-called Rialto and Jameson graders. In view of this lack of such "important invention" in such California graders and the presence thereof (which cannot be denied) in the new or modified Parker graders, *how exceeding strange* sounds this extract from appellants' brief, page 35:

> "We therefore state, without hesitation, *that the "Parker new sizer is a California sizer of the prior "art,* and therefore it follows that the Parker new "sizer placed on the market by the appellant Par- "ker since the rendition of the interlocutory de- "cree in this case, is not and cannot be held to be "an infringement of the sizer of the Strain reissue "letters patent."

Clearly this statement is erroneous. But it serves excellently to bring out clearly defendants' inconsistency.

> "The prior art was open to the rubber company. "That 'art was crowded,' it says, 'with numerous " 'prototypes and predecessors' of the Grant tire, "and they, it is insisted, possessed all of the quali- "ties which the dreams of experts attributed to the "Grant tire. And yet the rubber company uses "the Grant tire. *It gives the tribute of its praise "to the prior art; it gives the Grant tire the tribute "of its imitation,* as others have done."
>
> Diamond Rubber Co. case, 220 Fed. 444.

Appellants' brief devotes several pages to the defendants' old argument in regard to the preferred form of the Robert Strain invention, as shown in the drawings of the patent, embodying means for positively rotating each roller section separately and independently. This argument of this appeal has had its dress cut in the latest style to fit appellants' argument to 1916 conditions of this law suit, but it is the same old fallacious argument. Means for driving the rolls or roller sections form no part of the Strain invention in its broad aspect. On the first appeal defendants claimed non-infringement *because the rolls of the Parker patent grader were not positively rotated by any mechanical means.* This court correctly held the means for rotating the rolls had naught to do with the combinations of claims 1 and 10. This matter was most fully discussed in the briefs on the first appeal. It was shown to the satisfaction of this court that provision

must be made so that no pinch of the fruit would occur as it was carried along by the belt. Naturally if the roller be positively and mechanically rotated upward away from the belt that gave the most certain insurance against pinching the orange between belt and roller. But the evidence demonstrated that the roller would automatically rotate upward and that mechanical driving means were not absolutely essential. Appellants' argument, on this appeal, with respect to the means for rotating the roller side of the runway is an attempt to limit the invention to a narrow, literal construction of the specific forms of elements shown in the drawings, which in law only illustrate *the preferred form.* (R. S. U. S. 4888.) This court held that the invention and patent were not to be so limited. In connection with this contention defendants quote, on page 39 of appellants' brief, the answers of complainant to X. Q. 139 and X. Q. 57, but apply these to a different subject by erroneous application. Complainant testified that *in all* the California graders, prior to Robert Strain's invention, the roller side was constructed in sections coupled together in such manner as to form a continuous roller *so that no independent or individual adjustment of one grade opening could be had without affecting an adjacent grade opening.*

Nowhere has complainant testified that the independent *mechanical* rotation of the rollers was essential, or that driving or rotating each roll separately was the distinguishing feature between the Robert Strain invention and the prior "California" grader.

We quote from page 28 of appellants' opening brief on the first appeal as follows:

"A slight variation existing between defendants' "machines and the machine shown and described in the "patent in suit resides in the omission of positive "driving means for rotating the individual rollers. "Mr. Strain has shown his rollers positively driven by "belts, and such positively driving the rolls has been "made an element of all the claims of the reissue pat- "ent except claims one (1) and ten (10), the only ones "in controversy in this litigation.

"To limit either claim 1 or claim 10 to the means for "positively rotating the rollers is to make such claims "practically identical and of the same force, effect and "scope as other claims in the reissue patent, and the "fact that no mention is made in either of these claims "shows the intention not to limit them to such driving "or rotating means. This is particularly emphasized "by the inclusion of such means in the other claims "wherein they are definitely called for by the term " 'means to revolve each of said rollers, etc.,' in claim "3, and 'means for driving the rolls,' claims 4, 5, 6, 7, "8 and 9. In fact, the reason for not including others "of the claims as infringed by defendants' machines is "solely because of the limitation thereof to such 'means " 'for driving the rolls.'

"The defendants' machines embody and utilize ro- "tating rollers to form the grading openings. Rota- "tion of these rollers is caused by the oranges being "propelled along by the belt, the position of the belt "being slight under the horizontal axis of the roller,

"the fruit is carried along by the belt as an upward "movement against the surface of the roller, causing "it to revolve.

"Removal of the driving belts of the Strain machine "demonstrates that the action is the same, the rollers "rotating under the advancing action of the fruit in "the same manner and direction as where the driving "belts are used, the difference being merely one of de-"gree. The testimony of the witnesses on this point "is definite and certain."

Pages 29-41 of said brief contain extracts of the testimony concerning this feature, demonstrating that this court held that the presence or absence of positive or mechanical means for rotating the rollers was not material to the Strain invention or to the claims in suit.

Appellants' whole argument may be summed up by the rules of interpretation cited on page 57 of their brief. These are to the effect that *"the invention must "be restricted to the forms shown and described by the "patentee" and "the claim must be strictly construed."* It is thus apparent that appellants *concede* that in order to prevail upon this appeal they must insist that this court reopen its decision and reverse its finding that the Robert Strain invention *"was an important and dis-"tinct advance in the art"* (page 738) and that *"the "language of the claims is not, as argued by the de-"fendants, to receive a narrow, literal construction. "While the invention is not basic or primary, it is sub-"stantial and important, and is, therefore, entitled to "a fair range of equivalents."* (Page 740.)

It was the duty of the master to consider the Strain invention and to apply this interpretation so made by this court. The master did not err by following the decision of this court. That decision was binding upon him and upon the District Court. It is the law of the case.

On pages 44 to 48 of appellants' brief references are made to and alleged quotations from affidavits alleged to have been made by complainant by Mr. Knight and by one Thomas Strain in other litigation. We desire to call the attention of the court to the fact that neither of these affidavits are a part of the record in this case or before the court. The alleged affidavits of complainant Stebler and of Thomas Strain were never in any manner made a part of the record before the special master.

By referring to the printed transcript on page 122 it will be found that defendants offered in evidence the alleged affidavit of Mr. Knight, but it has not been made a part of the transcript on appeal, and is not before the court. It will be found, however, that no affidavit by Mr. Stebler was ever produced before the master and that no such affidavit is a part of the transcript before this court.

The alleged quotation on page 47 of appellant's brief from an alleged affidavit of Thomas Strain is entirely *dehors* the record. It was never referred to before the master or before the District Court, and would have been incompetent and inadmissible in any event.

The alleged affidavits of Mr. Stebler and Mr Knight could only be used in impeachment, and Thomas Strain

was not called as a witness in this case. It must be apparent, therefore, that the alleged affidavit of Thomas Strain could not be used for any purpose, and the alleged quotation therefrom on page 47 of appellants' brief cannot be considered.

The same is true of the alleged quotation from an alleged affidavit by Thomas Strain Jr. This is not before the court,—it was not before the master,—it was not before the District Court. Thomas Strain, Jr., was not called as a witness in behalf of either of the parties. These *ex parte* affidavits certainly are not competent testimony for any purpose.

The statement on page 45 of appellants' brief that the affidavit of Mr. Knight was "for the purpose of identifying defendants' new sizer or grader with the sizer or grader of the said Thomas Strain patent No. 775,015" is misleading. The testimony of Mr. Knight before the special master shows that the defendant Parker commenced the manufacture and installation for the Pasadena Orange Growers' Association of certain graders. That as first erected and installed these graders were provided with means for raising the traveling belt toward the roller to thus adjust the grade opening, such means consisting of hinged leaves or trapdoors which were mounted upon adjusting screws so that the hinged leaves or trapdoors might be pushed against the traveling belt, raising the surface it travels over and correspondingly raising the belt toward the roller.

When Mr. Parker had this installation about completed suit was brought by Mr. Stebler for infringe-

ment of this Thomas Strain patent. Upon this suit being filed and motion for temporary injunction made and an order to show cause issued, the defendant Parker changed this construction and totally eliminated from the Pasadena machines this trapdoor or hinged leaf construction.

It was with reference to the machines as constructed with this hinged leaf or trapdoor adjustment that Mr. Knight made the affidavit referred to.

Naturally any attempt to apply the *ex parte* affidavit testimony of Mr. Knight when comparing an entirely different construction and interrelation of mechanism would not apply to the new or modified forms of Parker machines, and this is thoroughly explained in the testimony and was completely understood and correctly applied by the master. Mr. Knight's affidavit did not in any manner impeach his testimony before the master, and any use of such affidavit could only be for the purpose of impeachment.

Appellants' brief, page 48, states that defendant Parker testified that the modified machines of the Riverside Orange Growers' Association were the same in all respects as the machine which was built for the Pasadena Orange Growers' Association. Unfortunately, this is only a part of Mr. Parker's testimony, and it is only a part of the truth when this statement is attempted to be read as a statement that the modified machines as held by the master to infringe the Robert Strain reissue patent were the same as the Pasadena Association machines *at the time* of the making of the affidavits by Mr. Stebler and Mr. Knight. The testi-

mony of Mr Parker on cross-examination shows that any attempt by him to claim that the Pasadena machines had not been changed after suit A92 was brought against him, was defeated. Mr. Parker's testimony [Transcript of record, pages 171-172, cross-examination] shows that the entire theory of adjustment of the grade openings was changed after suit A92 was brought and the motion for temporary injunction made and order to show cause issued. *After this,* the Pasadena machines were so changed as to infringe the Robert Strain reissue patent now before this court.

A great insistence is found in appellants' brief that the so-called Rialto grader is the same as the California grader and is in fact a California grader. On pages 54 and 55 are found quotations from the testimony of Mr. Knight to this effect But appellants apparently lose sight of the fact that even if it be admitted that the Rialto grader was a California grader it does not help appellants. Neither the California grader nor the Rialto grader embodies the feature of separate control or adjustment of each grade opening without affecting the adjacent grade-opening. On the other hand the new or modified Parker graders do embody this important invention and it has been judicially and finally determined by this court that this was the invention of Robert Strain and the subject of the patent in suit. It is clear, then, that every comparison which fails to take this inventive idea into consideration serves solely to befog the issue.

The difficulty confronting appellants is that this inventive idea is totally lacking in the prior art.

All of appellants' argument relative to the rolls of the preferred form of the Strain patent being "separately" mounted falls,—for the reason that such detail of construction is not necessary to the embodiment of the inventive idea in a practical machine and the claims in suit are not limited to such detail. This is true of each and every of the other limitations to details, insisted upon by appellants.

All of appellants' argument is answered by one question,—Why, if the California grader was so efficient and so satisfactory, did appellants find it necessary to deviate therefrom and to employ in the new or modified Parker machines this inventive idea of Robert Strain's, —the individual adjustment of the grade-openings without affecting adjacent grade-openings?

Appellants' Fifth Assignment of Error.

Clearly the District Court did not abuse its discretion in allowing complainant double damages for the manufacture and sale of the twenty modified Parker graders, manufactured and sold in open defiance of the injunction. Bearing in mind that defendant Parker, as the record clearly shows, is still in possession of a large profit from his wrongdoing and that complainant is a great loser by reason of the infringement and has been caused to spend thousands of dollars to protect his rights under the patent in suit and to recover a part of his loss occasioned by the wrongful acts of defendant Parker,—bearing in mind that the defendant Parker has been exceedingly and stubbornly litigious and has fought every possible contention to the last ditch,

—the District Court was clearly justified in penalizing Mr. Parker. The sum of $2340.20 is a small compensation for the many thousands of dollars loss in expense of litigation, which cannot be taxed as costs or disbursements. This court would be justified in increasing this allowance under the circumstances of this case. See

48 C. C. A. 470;

Consolidated Co. v. Diamond Co., 226 Fed. 455.

In this case just cited the court increased the damages by the sum of $50,000. The court took into cognizance the fact that the defendant had,—like defendant Parker here,—sought by every device to infringe the patent with impunity. Here defendants sought to avoid the writ of injunction ordered by this court by a merely colorable alteration of the very machines against which this court had ordered an injunction. They still praise the prior art, but they must and do embody the Strain inventive idea in their machines to filch complainant's business from him.

The rule is that the awarding of treble damages for infringement under R. S. U. S. 4919, 4921 (U. S. Compiled St. 1901, p. 3395) is discretionary with the court and will not be interfered with by the appellate court unless it appears that there has been a clear abuse of discretion.

Fox v. Knickerbocker Eng. Co., 165 Fed. 442, 444.

The damages found by the master by reason of the sale of the 20 modified Parker machines was $2,340.20.

It is clear from the evidence that this leaves a net profit to defendant Parker. He is still profiting by his wrongdoing. If the damages had been computed as contended for by complainant,—awarding the whole loss of complainant's profits on these machines,—the damages would have been $3,949. Defendant Parker is still causing complainant expense by his litigious conduct. No wrongdoer could possibly be more stubbornly litigious.

In Welling v. LaBan, 35 Fed. 303, Judge Coxe says treble damages should be awarded where the defendant has been stubbornly litigious.

In Carlock v. Tappan, 5 Fed. Cas. 2412, it is held that where it appears that plaintiff is entitled to further damages or that without such award the defendant would be profiting by his wrongdoing, treble damages should be awarded.

See, further:

Emerson v. Simm, 6 Fish. P. C.;
Lyon v. Donaldson, 34 Fed. 789;
Burdett v. Estey, 3 Fed. 566;
Fox v. Knickerbocker Co., 165 Fed. 442;
Weston v. Empire Co., 155 Fed. 301;
National Co. v. Robertson's Estate, 125 Fed. 524;
Kissinger-Ison Co. v. Bradford Co., 123 Fed. 91;
Morss v. Union Co., 39 Fed. 469;
Stimson v. R. R. Co., 1 Wall Jr. 164;
Whittemore v. Cutler, 1 Gall. (U. S.) 478;
Evans v. Helleck, 3 Wash. (U. S.) 408;

Livingston v. Jones, 3 Wall. Jr. 330;
Seymour v. McCormick, 16 How. 48;
Robinson on Pats., Secs. 953 and 1069;
Clark v. Chase, 119 U. S. 322;
Topliff v. Topliff, 145 U. S. 156.

It has been held that the court should take into consideration the fact that complainant has lost the interest on what he would have made (the damages) had defendant not appropriated his business. In this case such interest would amount to 35 per cent of the damages on the Parker patent type and to 14 per cent of the damages on the modified type, due to the long time complainant has been compelled to continue this litigation before securing a settlement.

National Co. v. Elsas, 81 Fed. 197; aff. 86 Fed. 917.

In Peek v. Fame, 9 Blatchf. 194, Judge Woodruff said: "The damages ought to be increased by a sum "sufficient to cover the expenses of the trial, and some-"thing more for the time and trouble of the plaintiffs."

In Russel v. Place, 9 Blatchf. 173, the damages were increased to indemnify the plaintiffs from loss by reason of the expense of litigation. In Parker v. Corbin, 4 McLean 462, the damages were increased so as to cover the plaintiff's expense in counsel fees.

The event of this litigation is to leave the complainant a great loser by the infringements of these defendants. If a further sum of $10,000 were awarded by this court, complainant would not even then be in the

same position as though defendants had respected and not infringed the patent in suit. This is not idle talk. The record proves these facts.

The complainant has expended thousands of dollars and a great time on this litigation during the six years it has been pending. This is the third time the case has been in this court. Defendants have once attempted to secure a full hearing in the Supreme Court, thus putting that additional expense on the plaintiff. The fault lies with the defendants,—not with plaintiff. Defendants are the wrongdoers and should not be permitted to profit by their wrongdoing.

Respectfully submitted,

FREDERICK S. LYON,
Solicitor and Counsel for Complainant.

No. 2772

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEBLER,
Complainant-Appellant,
vs.
RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION AND GEORGE D. PARKER,
Defendants-Appellees.

On Complainant's Cross Appeal from Final Decree.

Defendants'-Appellees' Reply Brief on Cross Appeal.

N. A. ACKER,
Counsel for Defendants-Appellees

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEBLER, *Complainant-Appellant,* vs. RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION AND GEORGE D. PARKER, *Defendants-Appellees.*	In Equity No. 2772 **On Complainant's Cross Appeal from Final Decree.**

DEFENDANTS'-APPELLEES' REPLY BRIEF ON CROSS APPEAL.

This case comes before this Court on a cross appeal to the appeal in case No. 2772, Riverside Heights Orange Growers Association and George D. Parker vs. Fred Stebler, taken from the final decree made and entered on the 30th day of October, 1915, by the District Court of the United States for the Southern District of California, Southern Division, affirming the Master's report and granting, allowing and awarding judgment against the Riverside Heights Orange Growers Association and George D.

Parker, as set forth in the said final decree, record page 339, companion appeal, Riverside Heights Orange Growers Association and George D. Parker vs. Fred Stebler.

By stipulation appearing on page 3 of appellant Stebler's record, the transcript of record in appeal case, Riverside Heights Orange Growers Association and George D. Parker vs. Fred Stebler, constitutes the appeal record in the present case, and this appeal under said stipulation is to be heard, submitted and determined upon the said transcript of record, and therefore the same forms the record on this appeal.

Appellant Stebler urges four assignments of errors, each going to the exceptions taken by him to the Master's report, said assignments of errors appearing on record page 6 of Appellant Stebler's transcript record.

The first and third of these assignments of errors may be considered together, inasmuch as they relate to the question of overhead expense allowed by the Master in ascertaining the cost incident to the manufacture of the infringing graders, and equally so, as to the manufacture by Appellant Stebler of the patented improvement in fruit graders covered by Claims One and Ten of Re-issue Letters Patent No. 12297 granted Robert Strain under date of December 27, 1904, for an improved fruit grader, a cut of the said fruit grader appearing opposite page 35 of appellant's brief in the case of *Riverside Heights Orange Growers Association and George D. Parker* vs. *Fred Stebler.*

Between pages 5 and 8 of the brief filed on behalf of Appellant Stebler in connection with the cross appeal, consideration is given to what is termed appellant's first exception, and the argument advanced on behalf of Appellant Stebler in support of an allowance of said exception is based solely on the ground that the Master had not sufficient data before him on which to base a finding as to an allowance of overhead expense to Appellee George D. Parker in connection with the manufacture of the infringing fruit graders, the contention being advanced that the Master had only two factors of the problem to be solved in proportioning the overhead expense, and that therefore, it was impossible for the Master to determine the proportion of overhead expense.

This argument is not in keeping with the facts presented to the Master. The Master had before him three known factors of the problem to be solved, and with these the solution was an easy one, and no difficult problem was presented to the Master to find the fourth factor of the problem. It was a mere matter of applying the well known rule of proportion.

By stipulation entered into between the parties on accounting, record page 185, the Master was given the total gross business of the manufacturer Parker for the year March, 1912, to and including March, 1913, and equally so, the gross overhead expense for conducting the general business of the said Parker for the said period of time, and by the said stipulation it was agreed that the gross busi-

ness therein given and the overhead expense therein given should be taken as an average of the overhead expense and the gross business of the said Parker for the years covered by the accounting period.

The manufacturer Parker filed with the Master and gave testimony before the Master disclosing the total number of infringing machines manufactured and sold by him during the period covered by the accounting, and equally so the cost and selling price of said machines, which machines constituted only a portion of the output of the general manufacturing business of the said Parker. The Master therefore had the following three factors of the problem to be solved in arriving at the proper proportion of the overhead expense chargeable to the business of the infringing machines, to wit:

1. The gross amount of the average yearly general business of the said Parker;

2. The gross average yearly overhead expense of general conducting of the business;

3. The total amount received for the infringing machines throughout the accounting period, which machines constituted a portion of the general business.

As found by the Master, record page 320, the total average yearly overhead expense of the general business was $4,259.15;

The gross yearly average general business $95,-933.21.

The figures of these factors being for yearly averages, must be multiplied by four, indicating the number of years of the accounting period. Thus

we have the total gross overhead expenses for the accounting period $17,036.60 and the total gross general business $383,732.84.

The total amount received for the infringing sizers sold during the accounting period was $18,375.

With these known factors of the problem the Master had no difficulty, by applying the ordinary well known rules, in finding that the overhead expense incident to the sizer or grader portion of the general manufacturing business was $815.85; for we have the proportion 383732.84 : 17036.60 : : 18375 : x. Multiplying the means and dividing by the extremes we have $815.53 as the amount of overhead expense proportioned to the infringing graders, which compared with the finding of the Master shows a slight error of thirty-two cents

It will, therefore, be seen that counsel for Appellant Stebler erred in the statement that the Master had only two factors presented for the problem to be solved and, therefore, with only two known factors could not apportion the overhead expense.

As pointed out, the Master had three known factors of the problem, which is all that is required to solve the unknown fourth factor of the problem.

This assignment of error relating to appellant's first exception to the Master's report was fully argued by counsel for Appellant Stebler before His Honor Judge Bledsoe, and His Honor, on giving full consideration to the Master's report, found that all the elements or factors necessary to be given for the solution of the problem had been presented to

the Master, and therefore overruled the exception.

We submit that Appellant Stebler's first assignment of error is not well taken and should be denied.

Considering the third assignment of error, and which properly is to be considered with the first assignment, for, as previously stated, each assignment of error relates to the question of overhead expense, it must be borne in mind that Appellant Stebler and Appellee Parker are manufacturers of a general line of fruit-house machinery, consisting of fruit washing machines, fruit elevators, fruit drying machines, sorting devices for fruit, elevating and dumping mechanism, fruit weighing machinery, and the various other devices which are utilized in the packing houses engaged in the sizing, grading and packing of fruit; the fruit sizing, or what has been termed throughout the present case, grading apparatus of the patent in suit, and the fruit sizing or grading apparatus manufactured and sold by the Appellee Parker, one of the defendants in the court below, constituting only one branch of the general business conducted by each.

Appellant Stebler seeks to have eliminated the allowance made by the Master and sustained by the lower court as to overhead expenses and the proportionable charge thereof to the fruit graders or sizers involved herein, the contention being that no such overhead expense allowance should have been made, or, in other words, that only such items should be taken into consideration in establishing the cost price of the sizer or grading machine as goes to

the physical parts thereof, no allowance being made for the general expense of conducting the business.

The law is otherwise, and we fail to find in the brief submitted on behalf of Appellant Stebler any decision in support of the contention advanced between pages 19 and 20 of his brief in support thereof.

The law is contrary to the contention made on behalf of Appellant Stebler, for it is expressly provided by law, where the patented machine and the infringing machine constitute only one of the articles placed on the market by the manufacturer thereof, that in addition to the cost of the physical parts of the machine, there shall be included as constituting a portion of the cost thereof, and the said machine shall stand chargeable with its pro rata portion of the overhead expense.

By the overhead expense we do not mean cost incident to the purchase of new machinery, or the supplying of broken parts, etc., incident to the machine, or used in the construction of the machines under investigation, but the overhead expense includes the expenses incident to the conducting of the business. As overhead expense the Master was required to take into consideration the interest on the money actually expended for machinery and power, *Herring* vs. *Gage,* 15 Blatch. 124; the value of the use of the tools, *Gould Mfg. Co.* vs. *Cowan,* 105 U. S. 253; the value of the real estate necessarily occupied in the manufacture of the devices, *Steam Stone Cutter Co.* vs. *Windsor Mfg. Co.,* 17 Blatch. 24; the reasonable salaries of superintendent,

American Nicholson Pavement Co. vs. *City of Elizabeth,* 1 B & A, 439; the cost of marketing, comprising salaries of clerks, warehouses, storehouses, etc., *Gould Mfg. Co.* vs. *Cowan,* supra; *Zane* vs. *Peck,* 13 Fed. 475; *Rubber Co.* vs. *Goodyear,* 9 Wal. 788; and where the patented invention constitutes only one department of the sales (as in the present case), the expenses of the business must be apportioned in the ratio of the respective sales of the infringing and the non-infringing articles, and the proportion of the former charged as the expense of their sales. *Hitchcock* vs. *Tremain,* 5 Fisher, 310. The testimony of the Appellee Parker given before the Master discloses that he is engaged in a general manufacturing business, and equally so, the testimony of Appellant Stebler discloses that he is engaged in a general manufacturing business, and under such circumstances the Master was required to take into consideration, in ascertaining the cost for the production of the infringing fruit graders, the general overhead expense of the business, and proportion the same in accordance with the general expense of conducting the entire manufacturing business.

Under the stipulation entered into between the parties, and appearing on record page 186, the gross amount of business done by the complainant and defendant is set forth; equally so, the expense of each party in conducting of the business. It was left with the Master, under said stipulation, to ascertain and determine what ratio of the overhead expense should be chargeable to the cost of manu-

facturing and marketing the sizing or grading machines. Clearly, under the decisions above set forth, the Master was correct in allowing the overhead expense and apportioning the same in accordance with the general business.

We submit that Appellant Stebler's third assignment of error, and also his first assignment of error should be denied and that the lower court, and, equally so, the Master, properly disallowed appellant's exceptions Nos. 1 and 3.

APPELLANT'S SECOND ASSIGNMENT.

This assignment of error relates to the exception taken to the Master's report relative to the non-allowance unto Appellant Stebler of the profits derived from the bins and distributing system which he sold and supplied with the patented sizer or fruit grading apparatus of the letters patent in suit.

In the argument advanced in support of this assignment of error, counsel for appellant assumes that a complainant on an accounting is entitled to all the profits which he would have made, not only on the patented article, but equally so on non-patented devices, or other patented devices manufactured and sold in conjunction with the patented structure, losing sight of the fact that the only question on an accounting to be determined by the Master is the profit derived by the complainant from the patented structure. The fact that it is difficult to separate the profits arising from the im-

provement (meaning the patented device) from those incident to the manufacture (including non-patented features) of the whole machine, is an insufficient reason for awarding the plaintiff more than he is justly entitled to receive.

Philp vs. Nock, 17 Wal. 460;
Calkins vs. Bertrand, 8 Fed. 755;
Gould Mfg. Co. vs. Cowan, 12 Blatch. 243.

In case he is unable to prove how much of the entire profit is due to his patented device, the complainant can only recover nominal damages.

Blake vs. Robertson, 94 U. S. 728.

Further, the profits on the exact invention, as distinguished from profits due to other features of the article as a whole, must be separated and alone accounted for.

Fay vs. Allen, 30 Fed. 426;
Roemer vs. Simon, 31 Fed. 41;
Gould Mfg. Co. vs. Cowan, 105 U. S. 253;
Ingersoll vs. Musgrove, 14 Blatch. 541.

In the present case, Appellant Stebler placed his patented sizer on the market under two distinct inventions, viz: A fruit grader covered by the reissue patent held to have been infringed, and the invention by United States Letters Patent No. 943799, granted F. Stebler under date of December 21, 1909, for an improved Distributing Apparatus, and which Letters Patent cover the distributing system and the fruit bins utilized by appellant in connection with the patented sizer or grader. These last

named Letters Patent appear in the record as "Defendants' Exhibit 7," and are in no manner whatsoever involved in the present litigation. It is a distinct invention, and admitted by the complainant to have been installed with the patented grader. Such being the case, it was incumbent on the complainant to separate the profits derived from the patented fruit grader from those derived from the features of said Letters Patent No. 943799, for "the patentee must in every case give evidence tending to separate or apportion the defendant's profit and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural and speculative."

Garretson vs. Clark, 111 U. S. 120.

The complainant must affirmatively show what profits are due to his invention and separate the same from the other features.

Tilghman vs. Proctor, 125 U. S. 136;
Bell vs. U. S. Stamping Co., 32 Fed. 549;
Ingersoll vs. Musgrove, 14 Blatch. 541.

That the device of the Letters Patent held to have been infringed is installed by the complainant as constructed under the protection afforded by Claims 1 and 10 of the Strain Reissue Letters Patent in suit, and that the distributing system and bins embodied in Appellant Stebler's machine are protected by United States Letters Patent No. 943799, relating to the improved distributing apparatus and

bins associated therewith,—see testimony of Appellant Stebler in answer to Q. 158, record page 98. Thus Appellant Stebler placed his apparatus on the market under the protection afforded by two United States Letters Patent, only one of which was involved in the accounting proceedings, to wit: Reissue Letters Patent No. 12297. Such being the case, the Master could not, under the law, have allowed unto the Appellant Stebler profits derived from the manufacture and sale of the patented device of Letters Patent No. 943799—Exhibit 7, and not involved herein.

Where the thing made and sold by the defendant contains not only the invention of the patent in suit, but likewise contains some other invention or feature not involved in the patented device, the complainant can only recover for that part due to the patented device or feature of the article sold, which is covered by the patent in suit.

Blake vs. Robertson, 94 U. S. 733;
Garretson vs. Clark, 111 U. S. 120;
Dobson vs. Carpet Co., 114 U. S. 445;
Dobson vs. Dorman, 118 U. S. 17;
Keystone Mfg. Co. vs. Adams, 151 U. S. 147.

In the case of *Blake* vs. *Robertson,* supra, the Supreme Court used the following language:

> "But inventions covered by other patents were embraced in those machines. It was not shown how much of the profit was due to those other patents, nor how much of it was manufacturer's profits. The complainant was, therefore, entitled to only nominal damages. This

> the court gave him. It was all the state of the evidence warranted. It would have been error to have given more."

On page 15 of Appellant's Brief, it is pointed out that the Reissue Letters Patent illustrate and describe fruit receiving bins located beneath the grading rollers, which bins receive and hold the fruit, and Appellant argues that by reason of this statement in the specification of the said Reissue Letters Patent, that claims 1 and 10, held to have been infringed, should be construed as covering the entire machine.

In advancing this proposition, Appellant ignores the fact that the Reissue Letters Patent, as issued, contained 10 claims, and the further fact that the fruit receiving bins, etc., are made portions of the combination of claims not involved herein, and it is therefore impossible to hold that claims 1 and 10 directed to the specific constructed sizing runway or grading elements of the apparatus were intended or designed to cover the entire machine.

Claims 2, 3, 4, 5, 6, 7, 8 and 9 of the Reissue Letters Patent have not been held to be infringed, and therefore appellee is not liable on an accounting for the subject-matter of the non-infringed claims, and if the Reissue Letters Patent cover the entire apparatus or an apparatus other than the fruit sizing portion covered by claims 1 and 10 of the said Letters Patent, such protection must be found to reside in one or more of the remaining eight claims not held to have been infringed, and for the inventions of which claims the Appellant is not liable.

The fact remains, however, that whatever may be

covered by said claims 2, 3, 4, 5, 6, 7, 8 and 9 of the Reissue Letters Patent, was deliberately thrown aside by Appellant and he substituted therefor to associate with the grading element or member of the apparatus, the invention of Letters Patent No. 943799 granted Appellant under date of Dec. 21, 1909 for an improved Distributing Apparatus. The Appellant therefore is not in a position, in view of his own acts, to contend at this time that claims 1 and 10 of the Reissue Letters Patent cover the entire machine as marketed by him, that is the invention of claims 1 and 10 covering the grading element of the Reissue Letters Patent associated with the invention of Letters Patent No. 943799, and which latter invention covers the Distributing System, and the fruit receiving bins associated with the marketing of the sizing elements covered by claims 1 and 10 of the Reissue Letters Patent.

The Master, therefore, should have apportioned the profits derived from the invention of claims 1 and 10 from the inventions covered by the remaining claims of the Reissue Letters Patent and from the profits derived from the use of the invention of the said Letters Patent No. 943799.

Counsel for appellant on page 24 of his brief under the heading of "Conclusion," in support of an allowance of the second assignment of error, directs attention to the case of *Brennan & Co.* vs. *Dowagiac Mfg. Co.,* 162 Fed. 472, and seemingly relies on this case as controlling the situation, and contends that his second assignment of errors is

within the authority thereof, and controlled by the law as expressed in said case.

This case was fully considered by the Supreme Court of the United States in the case of *Dowagiac Mfg. Co.* vs. *Minnesota Moline Plow Co.* and *Dowagiac Mfg. Co.* vs. *Smith & Zimmer,* decided on January 11, 1915, and reported in 235 U. S. page 641. This decision of the Supreme Court of the United States is the latest expression of the law on accounting, and is controlling on matters of this kind. We have referred to this case at length in brief filed on behalf of appellant in companion appeal, entitled *Riverside Heights Orange Growers Association and George D. Parker* vs. *Fred Stebler,* the application of this decision appearing on page 25 of said brief filed on said appeal.

Referring to the invention involved in the case of *Brennan & Co.* vs. *Dowagiac Mfg. Co.,* supra, the Supreme Court states that the defendants to said suit were not in the situation of the defendants to the suit of the *Dowagiac Mfg. Co.* vs. *Minnesota Moline Plow Co.,* inasmuch as in the case of *Brennan & Co.* vs. *Dowagiac Mfg. Co.* the Court of Appeals rendering the decision in said case, referring to the defendant thereto, stated:

> "It had made and sold these infringing drills with the purpose of imitating patentee's construction, therefore finding the infringement of the defendant to have been wanton and willful."

Such is not the situation in the present case, inasmuch as the infringement was not wanton nor will-

ful, for the record in the case of *Stebler* vs. *Riverside Heights Orange Growers Association* and *George D. Parker,* in which the accounting was had, discloses that the manufacturer Parker placed the infringing device on the market under and in accordance with letters patent of the United States which had been issued to him for the said invention and the lower court, in the decision rendered by Judge Wellborn, held non-infringement. However, in construing the patent involved in the case of *Brennan & Co.* vs. *Dowagiac Mfg. Co.,* supra, the Supreme Court in the case of *Dowagiac Mfg. Co.* vs. *Minnesota Moline Plow Co.,* supra, disagreed with the construction placed thereon by the Circuit Court of Appeals for the Sixth Circuit, stating:

> "It is quite plain, as we think, that the patent was not for a new and operative grain drill, but only for particular improvements in a type of grain drill then in use and well known."

This applies with full force to the invention of the Reissue Letters Patent before the Master in the present case on accounting, inasmuch as the subject matters of Claims 1 and 10, the only claims involved of the said letters patent, clearly disclose, and equally so, the record in the case of *Stebler* vs. *Riverside Heights Orange Growers Association and George D. Parker,* that the invention related to an improvement in a general type of machinery then on the market, to wit: Fruit Sizing Machinery, and the decision of this Court on the appeal of *Stebler*

vs. *Riverside Heights Orange Growers Association and George D. Parker,* reported in 205 Fed. page 735, expressly points out wherein the sizing feature of the Strain Reissue Letters Patent differentiated from the sizing features of the sizers or graders known as the Ish Grader and the California Grader.

Inasmuch as the Appellant Stebler placed the invention of the Strain Reissue Letters Patent on the market combined with the invention of Letters Patent No. 943799, Defendants' Exhibit 7, record page 272, and which said letters patent No. 943799 was an invention for the distributing system and bins, it was incumbent on Appellant Stebler, before the Master, to have segregated the profits derived from the invention of Claims 1 and 10 of the Reissue Letters Patent from the profits derived from the patented distributing system and bins, attributable and properly belonging to Letters Patent No. 943799, Defendants' Exhibit No. 7.

These features (the invention of Letters Patent No. 943799), constituted the unpatentable features of the machine placed on the market by appellant under Reissue Letters Patent, and inasmuch as the profits arising from these features and features controlled by separate and independent Letters Patent No. 943799 were commingled by Appellant Stebler with the profits which he received from the fruit sizer or grader of the Reissue Letters Patent involved in suit, it was his duty, under the law, and the burden rested on him, of segregating the profits of the said Letters Patent No. 943799, from the profits derived from the manufacture and sale of

the invention covered by Claims 1 and 10 of the Reissue Letters Patent.

As stated in *Underwood Typewriter Co.* vs. *Fox Typewriter Co.,* 220 Fed. page 881, following the law as expressed by the United States Supreme Court in the case of *Garretson* vs. *Clark,* 111 U. S. 120:

> "When a patent is for an improvement, and not for an entire new machine or contrivance, the patentee must show in what particular his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of other parts, so that the benefit derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patentable feature.' "

In the present case the testimony of Appellant Stebler, record page 55, disclosed that the grader would be no good without the distributing system and bins, and that the distributing system and bins which he employed or associated with the patented sizer or grader, constituted the distributing system and bins of Letters Patent No. 943799. Such being

the case, without question the main profit derived from the sale of the article which he placed on the market was attributable directly to the invention of Letters Patent No. 943799, Defendants' Exhibit No. 7.

As pointed out on page 23 of brief filed on behalf of appellant in companion appeal entitled *Riverside Heights Orange Growers Association and George D. Parker* vs. *Fred Stebler,* no effort was made by Appellant Stebler to segregate the profits of the patented features of Letters Patent No. 943799 from the patented features of the invention of Claims 1 and 10 of the Strain Reissue Letters Patent herein involved.

This brings the case within the law as expressed by the United States Supreme Court in the case of *Dowagiac Mfg. Co.* vs. *Minnesota Moline Plow Co.,* supra,

> "That the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence where the profits from the sale of the infringing drills could be apportioned between the patented improvements and the unpatented parts."

Citing with approval the law as expressed in *Westinghouse Co.* vs. *Wagner Co.,* 225 U. S. 604.

> "Insofar as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and insofar as they were due to other parts or feature they belonged to the defendants; but as the drills were sold in complete and operative form the profits resulting from the several parts

were necessarily commingled. It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it, for, as was said in *Westinghouse Company* vs. *Wagner Company,* supra,

> 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.'

"In the nature of things, the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff, and therefore it was required to take the initiative in presenting evidence looking to an apportionment. Referring to a like situation, it was said in the case just cited:

> 'The burden of apportionment was then logically with plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention.' "

Appellant Stebler did not comply with the burden thus placed on him and he was, therefore, entitled to no allowance for profits derived from the invention of Letters Patent No. 943799, and which profits he commingled with the profits of the invention of Claims 1 and 10 of the Reissue Letters Patent, and which inventions were placed on the market associated with the invention of said Letters Patent No. 943799. He should have been allowed only nominal damages.

We submit that Appellant Stebler's second assignment of errors is not well taken and should be denied, and that the lower court should be sustained

in denying the exception to the Master's report thereon.

APPELLANT'S FOURTH ASSIGNMENT.

It is submitted that the argument advanced in support of Appellant Stebler's fourth assignment of errors is urged and contended for under a misconceived idea of the decision of this Court in the case of the *Riverside Heights Orange Growers Association and George D. Parker* vs. *Fred Stebler,* 214 Fed. page 550. The expressions "damages" and "profits" as referred to in said decision for the purpose of an accounting are only terms to designate that the complainant shall receive the full sum which he would have derived by the manufacture and sale of the patented structure. If the sum realized by the defendant as profits from the wrongful act of infringement is not sufficient to compensate the complainant for the sum which he would have realized had he manufactured and sold the patented structure, then, and in such event, the complainant receives from the defendant as profits the full sum which the defendant has realized from the manufacture and sale of the infringing structure and, in addition thereto, is entitled to receive such further sum from the defendant which, added to the profits of the defendant, will give unto the complainant an amount equal to that which he received from the manufacture and sale of the patented structure; in other words, if the defendant realizes the sum of $5,000 from the manufacture and sale of a given

number of the infringing articles and the complainant would have realized the sum of $10,000 from the manufacture and sale of the patented device, then, on an accounting, on proper proof being presented, the complainant receives from the defendant the full sum of $5,000 realized as profits by the defendant and, in addition thereto, he receives as damages the further sum of $5,000, so that the total amount paid by the defendant unto the complainant will, under such circumstances, aggregate the sum of $10,000, or the full amount which the complainant would have received had he manufactured and sold the patented devices. This is all he is entitled to, inasmuch as it represents his full compensation, and more he is not entitled to.

If, on the other hand, complainant would have realized the sum of $5,000 from the manufacture and sale of the infringing article, and the defendant realized from the manufacture and sale of the same number of infringing articles the sum of $10,000 as profits, then, and in such event, the complainant receives from the defendant as "damages" the sum of $5,000 and as "profits" an additional sum of $5,000, making a payment from the defendant unto the complainant of the sum of $10,000. In either event, the complainant receives all that has or would have been made, and such payment represents the full sum of recovery to which he is entitled. He is not entitled, where his profits exceed those of the defendant, to recover from the defendant the whole of such sum and, in addition thereto, the amount which the defendant derived; or where

his profits are less than the defendant's, he is not entitled in such case to receive all of such profits, and, in addition thereto, the full profits which the defendant realized; in other words, the two sums cannot be added together.

In construing that which the complainant was entitled to receive from the defendant, this Court held in its decision:

> "The plaintiff derives his profit from the manufacture and sale of the fruit grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the price for which he sells the machines. These profits are, therefore, the only compensation which he receives for the machines manufactured and sold by him during the life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendant herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself."
>
> 214 Fed. 554.

By this language it was not intended by this Court to change or vary the fixed law relative to the manner of ascertaining the recovery which complainant was entitled to on an accounting for infringement of his patented structure, but expressly states that the *full compensation* due complainant constitutes the *difference between the cost of manu-*

facture and the price for which he sold the patented structure, and that when he received this amount, full compensation is made.

It has only been since the Act of 1870 that damages have been recoverable on an accounting, but ever since said Act, profits and savings are still the measure of recovery in equity, unless the extent of the complainant's loss requires an additional allowance of damages.

> Willamette Thread Co. vs. Clark Thread Co., 27 Fed. 865;
>
> Birdsall vs. Coolidge, 93 U. S. 64.

In the latter case the Supreme Court states:

> "Damages of a compensatory character may also be allowed to the complainant suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of its exclusive right secured to him by the patent."

In the present case, the Master found that the defendant's profits were not sufficient to compensate the complainant, and he therefore allowed such an additional sum over and above the profits realized by the defendant as would fully compensate the complainant for the loss which he had sustained, such additional amount representing the difference between the amount realized by the defendant and that which would have been realized by the complainant had he sold the machines, the total of the

two amounts equalling that which the complainant would have received.

The Master in rendering his report followed the law as set forth in *Willamette Thread Co.* vs. *Clark Thread Co.,* supra, and as set forth in the case of *Westinghouse* vs. *New York Air Brake Co.,* 131 Fed. 607, wherein the Court stated:

> "The rule is clear that the profits which the complainant might have gained by supplying such demand are recoverable as damages which it suffered thereby. It is also clear that, if such sums exceed the profits which the defendants gained, such profits can be enlarged until they equal the complainant's losses, but that the two amounts cannot be added together and charged up to the defendants."

We know of no law, nor has counsel directed our attention to any decision, which supports the proposition advanced by him on behalf of Appellant Stebler, which position is that Appellant Stebler is entitled to receive all the money which he would have derived from the invention of Claims 1 and 10 of the Strain Reissue Letters Patent had he sold the infringing machines, and, equally so, all which he would have derived from the independent invention of Letters Patent No. 943799 which he associated and commingled therewith, and that in addition to this full amount, he should receive the full amount which was derived by the Appellee Parker in connection with the sale of the infringing device, where the appellant's profits exceeded those of the appellee infringer. The position assumed by counsel is that under the decision of this Court,

in the case of *Stebler* vs. *Riverside Heights Orange Growers Association and George D. Parker,* 214 Fed. 554, the intent of the Court was to change the fixed law of the land and to make a law for this Circuit contrary to the law as expressed by the Supreme Court of the United States and followed in every other Circuit in compliance therewith. We do not believe that this Court intended so to do, nor do we believe that there is any foundation in the decision of this Court in connection with the case of *Stebler* vs. *Riverside Heights Orange Growers Association and George D. Parker,* supra, on which can be founded any basis for the argument in support of the position which is advanced by counsel for appellant. All this Court intended by its decision and all that is expressed therein is, that the infringer shall pay unto the owner of the letters patent the full profit which he received from the sale of the infringing device, and that if these profits fall short of the profits which the owner of the letters patents would have received, had he made the sale of the infringing device, then, and in such case, the infringer shall pay unto the owner of the letters patent such additional amount over and above his profits as will give to the owner of the letters patent the amount which the said owner would have received.

In the present case the Master found what the profit would have been to Appellant Stebler had he sold the found infringing machines, and, equally so, the profit which Appellee Parker derived from the sale of said infringing machines; in other words,

the Master found that Appellee Parker received as profit the sum of $5,232.85 and that Appellant Stebler would have received, had he sold the same machines, $11,470.20, and he therefore allowed to Appellant Stebler the full profit which Appellee Parker received and in addition thereto he allowed as damages the further sum of $6,237.35, so as to give unto Appellant Stebler the full sum of $11,470.20, the amount which he would have received had he sold the infringing machines.

This is all the Master could have found allowable to Appellant Stebler under the law.

We submit that Appellant Stebler's fourth assignment of errors should be denied.

Respectfully submitted,

N. A. ACKER,

Solicitor and Counsel for Appellees.

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No. 2772

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION, a corporation and GEORGE D. PARKER,

Appellants,

vs.

FRED STEBLER,

Appellee.

Reply Brief on Behalf of Defendants'-Appellants

N. A. ACKER,
Counsel for Defendants-Appellants

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RIVERSIDE HEIGHTS ORANGE GROWERS ASSOCIATION, a corporation and GEORGE D. PARKER, *Appellants,* vs. FRED STEBLER, *Appellee.*	No. 2772 On Appeal by Defendants from Final Decree.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Due to the fact that appellee's brief was not served until the day of the hearing, the Court accorded Appellants permission to file a reply brief.

Inasmuch as appellee's brief presents several issues not heretofore raised, we deem it advisable to answer same.

Between pages 1 and 10 of brief, appellee urges that the appellants have not the right to review any-

thing on this appeal, other than the objections urged to the Master's report.

The answer to this assertion is, first, our exceptions to the Master's report give foundation for each of the assignment of errors, excepting the fifth, and, secondly, the appellants are not appealing from the Master's report, but from a final decree of the lower Court.

Pages 10 to 70 of appellee's brief is an argument in support of infringement of claims 1 and 10 of the Strain Reissue Letters Patent by the manufacture and sale of the new sizer placed on the market by appellant Parker after the rendition of the interlocutory appeal. In the main, the subject matter contained between said pages of the brief is directed toward advising this Court what it intended to cover by its decision rendered in connection with appeal case No. 2772 entitled Stebler vs. Riverside Heights Orange Growers Association and George D. Parker, 205 Fed. 735, and a studied effort is made to show that by said decision this Court intended to hold that claims 1 and 10 of the said Reissue Letters Patent covered broadly any and all means for securing independent adjustment of the discharge outlet portions of the fruit runway for the sized fruit. Such is not a fact. The decision speaks for itself and should require no effort on the part of counsel to explain its meaning. It is only by inducing the Court to accept such construction of the decision, that appellee hopes to have the sizer placed on the market by appellant Parker since the rendition of the interlocutory decree, held to be an in-

fringement of claims 1 and 10 of the Strain Reissue Patent.

The prior art introduced in evidence in connection with appeal case No. 2772 precludes any such broadened construction being given at this time to the invention covered by claims 1 and 10 of the said Strain Reissue Letters Patent, and no such contention was advanced for the said invention throughout the trial of the case in the lower Court, nor before this Court in connection with said appeal case No. 2772. This issue is raised for the first time in connection with the present appeal.

The issue presented by said appeal case No. 2772 was not whether individual adjustment of the grade-way outlets for the sized fruit was new and utilized by the appellee to said appeal, for admittedly, the machine held by the lower Court to be a non-infringement, had independent and individual adjustment in this respect, operated in the same manner and for the purpose as disclosed by the Strain Reissue Letters Patent, and, equally so, the prior art disclosed sizing devices having independent and individual adjustment for the control units for the grade-way outlets for the sized fruit, which adjusting units were adjustable individually and independently of each other, i. e., they were not connected one to the other, for the movement or adjustment of one did not vary or change the position of an adjacent unit. Had the issue presented by appeal case No. 2772 been confined to the question whether or not the invention of claims 1 and 10 of the Strain Reissue Patent covered broadly any form of means

for independently and individually varying the grade outlets of the fruit runway, the solution would have been an easy one; inasmuch as the prior art disclosed such means in connection with fruit sizers and negatived any such construction for the Strain Reissue invention. Such, however, was not the question presented to this Court by said appeal, nor in its decision did the Court give any such construction to the inventions of claims one and ten of the Strain Reissue Letters Patent. The appeal dealt solely with two and only two presented questions, viz.:

First—Did it involve invention, over the prior art, to construct the roller member of the Strain Reissue Letters Patent of a series of longitudinally aligned rollers arranged end to end, each roller being separately and individually adjustable, mounted in bearing brackets of its own, and the bearing brackets individually transversely movable, whereby any roller of the series of end to end independent and disconnected rollers could be independently and individually adjusted toward and from the fixed member of the fruit runway without disturbing the position of an adjacent roller.

Second—Did the Parker machine (held by the lower Court to be non-infringing) infringe claims 1 and 10 of the Strain Reissue Letters Patent, said apparatus having embodied therein as the roller member of the runway a series of separated independently and individually adjustable rollers arranged in longitudinal succession, each mounted in bearing brackets of its own, adjustable toward and

from the fixed member of the fruit runway, the said rollers separated a distance apart and the space between the rollers being bridged by overlapping guide arms.

By its decision this Court held that the combinations called for by claims 1 and 10 of the Strain Reissue Letters Patent were not anticipated by the prior art, and that the same were infringed by the said Parker machine. However, this Court did not, by its decision, give to the said claims the new construction now contended for by counsel for the appellee herein, for, as stated, the prior art negatived any such construction. This is a new issue, raised for the first time in connection with this litigation.

It is only by enlarging the decision of this Court to the extent now contended for on behalf of appellee Stebler, that the machine placed on the market by appellant since the entry of the interlocutory decree, can be held to be an infringement.

In the absence of a full hearing in the light of additional prior art directed to this new issue, we do not apprehend that this Court will enlarge or expand its decision so as to accommodate appellee Stebler to the extent of including a different machine to the one held to have been infringed.

Appellee Stebler successfully urged before the Master that the decision of this Court in appeal case No. 2772 was final as to this new machine so far as related to additional prior art relative thereto, contending (as he now does on brief) that the matter was *res adjudicata* between the parties. Such is not the case. The act now complained of is a new act of

claimed infringement and presents a new and undecided issue, and we earnestly submit that if the Master was to try and determine a new issue, appellant Parker was entitled to put in additional prior art to show that the new machine came within the same, and equally so to combat the contention that this Court's decision was entitled to be enlarged and so construed as to cover any form of means for varying the discharge outlets of the fruit runway for the sized fruit. This is a right which heretofore has been denied unto appellant Parker.

The member of the so-called Parker new machine in contra-distinction to the roller member of machine held to be an infringement, is not formed of a series of separated independent and individual adjustable rollers, each mounted in bearing brackets of its own which are adjustable toward and from the fixed member of the fruit runway, but on the contrary, the same consists of a series of roller sections each connected one to the other to form a roller extended the entire length of the machine, the roller sections being driven in unison by power applied at one end. The roller sections are connected one to the other, as are connected the roller sections of the California Sizer, the Jameson California Sizer and the Rialto California Sizer (illustrated by cuts opposite p. 29 of appellant's opening brief), and they are driven in unison and adjusted in the same manner as in said machines. If the Parker California Sizer falls within the construction now contended for by appellee Stebler for the decision of this Court, then equally so does the Jameson—the Rialto

and the California Sizers of illustrations 2, 3 and 4. The Rialto Sizer was produced to disclose that where the roller member of the fruit runway consisted of a series of connected roller sections driven in unison, it conformed to the California Sizer, due to the fact that you cannot adjust one connected roller section without varying the position of an adjacent roller section and any adjustment imparted to an adjacent roller section (however slight it may be) varies the grade outlet controlled thereby.

In argument, counsel for appellee admitted illustrations 5 and 6 of our brief correctly represented appellant Parker's new device, and admits at bottom of p. 59 of brief, that in this respect the Rialto Sizer corresponds to the California Sizers of the prior art. Inasmuch as in appellant Parker's California Sizer (new machine) the roller member of the fruit runway is composed of a series of roller sections united one to the other in the same manner as the roller sections of the Rialto machine and as the adjustment and the manner of driving the connected roller sections is the same as in the California Sizer, it must follow that whatever takes place under the Rialto machine follows correspondingly from the Parker California Sizer, and to this extent it is the California Sizer of the prior art. You cannot adjust one roller section of the roller member of the Parker California Sizer without adjusting or changing the position of an adjacent roller section, just as adjusting one roller section of the connected roller sections of the Rialto, Jameson or the California Sizer disturbed an adjacent roller section. They are the same in this re-

spect, and as that which differentiated and was held by this Court to differentiate the Strain patented reissue sizer from the prior art resided in the fact that the inventions called for by claims 1 and 10 thereof comprised a series of independent end to end rollers arranged in longitudinal succession, each mounted in individual bearings independently and individually adjustable, whereby any roller of the series of disconnected rollers could be independently and individually adjustable, so that adjustment imparted to one roller would not disturb the position of an adjacent roller, it follows, that a machine operating on different principles, not having independently and individually adjustable rollers, can not be an infringement of the construed claims.

Throughout the brief counsel directs attention to the number of years this litigation has been pending and to the further fact that the case has been before this Court three times, urging therefrom that appellant Parker has been a stubborn and what he terms a "litigious" infringer. The record of this litigation does not support counsel, in this assertion.

The first and second appeals to this Court were taken by appellee Stebler, and, strange to say, we find him party appellant by cross appeal taken to the present appeal.

The suit was commenced May 24, 1910, but complainant did not take his opening testimony until February, 1912.

The interlocutory decree was entered November 7, 1913, but complainant did not proceed with his

accounting until July, 1914. Master's report filed October, 1914. Each party filed exception to said report. Exceptions duly presented to the lower Court and decided October, 1915. No delays can be charged to appellants herein.

Counsel criticizes our statement relative to the Jameson California Sizer being in use prior to the year 1900. It is only necessary in this connection to direct attention to the testimony given by Mr. Jameson in appeal case No. 2772. Mr. Jameson testified that the machine had been in use since 1898. Witness Proud, to whose testimony counsel directs attention, merely testified that he lengthened the machine in 1900. Otherwise it was the same machine. However, even if the testimony of Mr. Proud as to the lengthening of the Jameson California Sizer in the year 1900 be taken as the date of the Jameson device (contrary to the testimony of Mr. Jameson), still, the year 1900 is prior to the date of the Strain invention of the Reissue Letters Patent, which Reissue Letters Patent were not issued until 1904, on application filed October 21, 1903. The original Letters Patent of the Reissue Patent issued June 9, 1903, on an application filed April 28, 1902.

Why counsel for appellee Stebler throughout brief undertakes to advise the Court that our statements should be read with "caution" and possibly with "suspicion," we are at a loss to understand. It is a reflection on the integrity of counsel and, as such resented. Not a single misstatement has been made in brief filed on behalf of appellants, and such

inferential statements are uncalled for and not expected from reputable practitioners.

Between pages 70 and 74 of brief, counsel directs the Court's attention to the quotations made from Knight, Stebler, Thomas Strain and Thomas Strain, Jr., affidavits filed in the lower Court in case A-92, contending they find no place in the present case. No attempt is made to deny the correctness of said quotations and none could be made, for counsel knows the same to be absolutely true. While the affidavits are not in the present record, they nevertheless were before the Master, as they constituted a portion of the record in case No. A-92—Stebler vs. George D. Parker, et al. When request was made to copy the Knight affidavit into the present record, the Master held it was not necessary so to do, stating, Record, p. 122—"It is on file in the Court as part of the records in that case (meaning Equity suit A-92) and can be considered read in the testimony." With the record of said case the affidavits were, therefore, before the Master, and each upheld appellant Parker and confirms the Master in his report as to the Parker California Sizer not having independent and individually adjustable rollers; they further support witness Parker, that in the new sizer the roller member comprised a series of connected roller sections so united one to the other as to constitute a single roller, the connected sections driven in unison from power applied at one end, and the affidavits of Thomas Strain and Thomas Strain, Jr., support the testimony of appellant Parker that his so-called new machine is the

same in its connection of the roller sections and the driving and adjusting thereof, as the California Sizers of the prior art.

It is for these reasons that counsel now seeks to prevent consideration being given to the quotations from said affidavits.

Between pp. 74 and 78 of brief, counsel in arguing against the allowance of our fifth assignment of errors, contends that the damages should have been doubled, due to the fact that appellant Parker manufactured and sold machines in defiance of the injunction, and repeats over and over again that he still has in his possession "large profit" from his wrongdoing.

We submit that appellant Parker in no manner attempted to disobey the injunctive order of the Court. He placed on the market a machine he believed to be constructed under the prior art; he sought advice of counsel and was advised that it did not infringe claims 1 and 10 of the Strain Reissue Patent and, was further advised that the construction given by this Court to claims 1 and 10 of the Strain Reissue Patent defined the invention thereof to differ from the prior art in the same manner and to the same extent as the machine he proposed manufacturing and selling differed from the Strain invention. Under the circumstances, the action of appellant Parker cannot be said to be an attempt to violate the injunctive order of the Court.

It is difficult to understand how appellant Parker can still be in possession of "large profits" or any profit, since the Master has found that all profit

realized from the manufacture and sale of the infringing machines should be paid over to appellee Stebler, and, in addition thereto, a large sum in excess thereof as damages.

The action of appellee Stebler in the present case so far as relates to the manufacture and sale of the machine after the date of the injunctive order, simply exaggerates the method sometimes resorted to in patent litigation by the owner of a patent (which is a late comer into an established art) to tie up an industry, which is—

First—commence action against a defendant manufacturing a device performing the same function as that accomplished by the patented combination and which claimed infringing machine is sufficiently an approach to the patented structure to justify the suit. If decision is favorable to the claim of infringement, then, on the infringer placing another article on the market commence action for infringement, claiming the same to be a mere colorable evasion of the adjudicated patent and attempt to have the decision enlarged to include the same. In such event, the defendant to the new suit is free to plead additional prior art to justify the new machine and prevent an enlargement of the prior decision.

In the present case, however, such consideration was not shown. Instead, appellant Parker was led to believe the new machine was not claimed to be an infringement of the Strain Reissue Patent, due to the fact that appellee Stebler instituted suit A-92 against said Parker for infringing the Thomas

Strain patent—Def. Ex. 6, and the Stebler patent—Def. Ex. 7, by the manufacture and sale of the new machine, contending in affidavits of Knight and Stebler, filed for use on preliminary injunction (which was not granted) that the roller member of said machine consisting of a series of connected roller sections united one to the other and not independently and individually adjustable, was the full equivalent of the single flexible rod disclosed in the Thomas Strain patent as the sizing roller member for the said patented sizer.

Accounting in the present case was then proceeded with and appellant Parker ordered to produce all records, etc., in connection with the held infringing machines, which was done. Counsel for Stebler then ordered that the new machine for the first time charged with being an infringement be produced, and contended before the Master that as to said machine appellant Parker was not entitled to introduce any prior art which was not introduced in the record of appeal case No. 2772, or in other words the doctrine of *res adjudicata* applied. It was a deliberate and studied effort to prevent a full hearing unto appellants as to the new claimed act of infringement and, strange as it may appear, the Master accepted this contention and ruled that as to the prior art appellant Parker had had his day in Court and was estopped from introducing additional prior art.

We submit that either counsel was earnest when he filed Equity suit A-92 charging said machine to be infringement of the Thomas Strain patent—Def.

Ex. 6, and filed supporting affidavits charging the roller member of the new sizer to be the same as the single roller member of the sizer of the said letters patent, and, consequently, different from the roller members of claims 1 and 10 of the Strain Reissue Letters Patent, or else he filed said suit to lull the appellants into the belief that it was not a claimed infringement of the said Strain Reissue Letters Patent, so as to permit a continuance of the manufacture and sale of said machine until he elected to take an accounting, intending on said accounting to demand the production of said machine and to hold before the Master that the doctrine of *res adjudicata* applied against the introduction of prior art. If the latter was the case, then such practice is to be condemned.

We earnestly contend that appellant Parker's new California sizer is not an infringement of claims 1 and 10 of the Strain Reissue Letters Patent as construed by this Court; further, that under the practice resorted to by counsel for Stebler, said appellant has not had his day in Court relative to this new claimed act of infringement, nor permitted to set up the defenses provided for by the United States Statutes to a charge of infringement, and finally that the decision of this Court should not be enlarged to cover a disputed issue of infringement.

Respectfully submitted,

N. A. Acker,

Counsel for Defendants-Appellants.